91-1388

No. _____

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In The

Supreme Court Of The United States

October Term, 1991

ERIC N. PERSON,

Petitioner,

v.

LARRY MEACHUM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT THE WITNESSES AGAINST HIM WHEN THE TRIAL COURT PREVENTED THE PETITIONER FROM PRESENTING MATERIAL EVIDENCE RELATING TO THE SOURCE OF CHILD COMPLAINANT'S KNOWLEDGE OF SEX?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ERIC N. PERSON, Petitioner
v.
LARRY MEACHUM, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Eric N. Person, respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals for the Second Circuit entered in this proceeding on February 18, 1992.

OPINIONS BELOW

The Court of Appeals for the Second Circuit issued its opinion affirming the denial of the Petitioner's Motion for Summary Judgment on Petition for Habeas Corpus relief under 28 U.S.C. § 2254 on February 18, 1992, which opinion was unreported. (App. A).

Preceding the Second Circuit Court of Appeal's decision, the District Court for the District of Connecticut denied the Petitioner's Motion for Summary Judgment on his Petition for Habeas Corpus Relief and granted the Respondent's Motion for Summary Judgment on the petition. The District Court's decision is reported in *Person v. Meachum*, 772 F. Supp. 69 (1991). (App. B).

Preceding the Petition for Habeas Corpus, the Connecticut Supreme Court issued an opinion affirming Petitioner's conviction on charges of sexual assault in the second degree and risk of injury to a minor, which decision is reported in *State v. Person*, 215 Conn. 653, 577 A.2d 1036 (1990). (App. C). A petition for writ of *certiorari* from this Court to the Connecticut Supreme Court was denied on January 14, 1991, *Person v. Connecticut*, ___ U.S. ___, 111 S. Ct. 756 (1991).

Preceding the Connecticut Supreme Court decision, the Connecticut Appellate Court issued its opinion affirming the Petitioner's conviction on September 26, 1989, which decision is reported in *State v. Person*, 20 Conn.App 115, 564 A.2d 626 (1989). (App. D).

JURISDICTION

The order of the Second Circuit Court of Appeals was rendered on February 18, 1992. This petition for a writ of certiorari was filed within ninety (90) days of that denial. Therefore, this Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of

the laws.

FEDERAL RULES OF EVIDENCE

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

STATUTORY PROVISIONS INVOLVED

§53-21. Injury or risk of injury to, or impairing morals of, children

Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both.

§53a-71. Sexual assault in the second degree: Class C Felony: Nine months not suspendable.

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse

with another person and such other person is (1) under sixteen years of age.

(b) Sexual assault in the second degree is a Class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court.

§ *54-86e. Information re address or telephone number of victim of sexual assault to be confidential*

The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused.

STATEMENT OF THE CASE

Trial Court Proceedings

Petitioner, Eric N. Person, was accused in a four count information with sexually abusing his two children, Jennifer and Jamie.[1] Counts three and four involved his daughter, Jamie, and charged the Petitioner with risk of injury in violation of Conn. Gen. Stat. § 53-21 and sexual assault in the second degree in violation of Conn. Gen. Stat. § 53a-71(a)(1). After a jury trial, the Petitioner was found guilty of counts three and four involving Jamie.

At trial, the state's case centered on the testimony of Petitioner's eight year old daughter, Jamie Person. The Petitioner and his ex-wife had joint custody of Jamie who visited the Petitioner on weekends at his apartment. (Transcript of, hereinafter, "T", 11-24-88 at 27). Jamie testified that during her visits the Petitioner would take her into his bedroom and engage in sexual acts. (T. 11-12-87 at 30-37). To corroborate Jamie's testimony by way of constancy of accusation, the State also called Jamie's mother, Debra Person, and Detective Yakacki. (T. 11-17-87 at 152-162). The prosecution also called Jamie's brother, Cameron, and Jamie's pediatrician, Dr. Hochstadt.

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[1] Counts one and two involved his daughter, Jennifer, and charged the petitioner with risk of injury in violation of Conn. Gen. Stat. §53-21 and sexual assault in the fourth degree in violation of Conn. Gen. Stat. §53a-73a(1)(D). The petitioner was found not guilty of these counts.

The defense called as witnesses various persons who visited with or saw the Petitioner at his apartment during the time he was alleged to have assaulted Jamie. Joseph Marzullo, the Petitioner's landlord, testified that he observed the Petitioner with his children and that he believed the Petitioner was a good father, active with the children and found Jamie to be very affectionate toward her father. (T. 11-24-87 at 50-64). Eric "Ricky" Person, the Petitioner's son, also testified that during his visits with the Petitioner Jamie was usually very happy. (T. 11-25-87 at 66).

Petitioner also testified in his own defense. (T. 12-2-87 at 11-105). He denied sexually abusing Jamie. He explained that during the period Jamie and his other children visited his Danbury apartment his close friend, Dean Mercier was almost always present. Mercier visited nearly every weekend and stayed overnight on occasion. (T. 12-2-87 at 18-25). Mr. Mercier also stated that he visited the Petitioner in Danbury on "about every weekend" since May of 1984. (T. 12-2-87 at 137). He testified that it appeared to him that the Petitioner had a very good relationship with Jamie and his other children, and that he had no reason to believe that the Petitioner had any kind of unusual relationship with his children. (T. 12-2-87 at 151).

The state's case against the Petitioner rested almost entirely on the testimony of the Petitioner's younger daughter. She was the only person to directly testify that any acts of deviant sexual contact ever occurred.

Despite the critical nature of Petitioner's daughter's testimony, the Petitioner was not allowed to introduce certain evidence that his younger daughter's best friend,

Lauren Ardell, had made strikingly similar accusations against her own father two weeks prior to the time that Petitioner's daughter accused Petitioner of sexually abusing her. The affidavit in support of Petitioner's arrest and Lauren's father reveal the striking similarities in the two cases.[2] Lauren's father's arrest affidavit is dated February 24, 1987, and Petitioner's arrest affidavit is dated March 10, 1987.

Jamie Person testified that the first person with whom she discussed Petitioner's conduct was her best friend Lauren Ardell. (T. 11-2-87, 64). Apparently, the two girls discussed the respective allegations of sexual abuse during recess at school. (T. 11-12-87, 64) Lauren reported the conversation to her mother who then informed Petitioner's wife, the alleged victim's mother. (T. 11-12-87, 64-66).

Based on the foregoing, defense counsel sought to examine Lauren to determine whether Petitioner's daughter's knowledge of deviate sex was the result of what she learned from Lauren. (T. 11-24-87, 15-17). Defense counsel wanted to demonstrate an alternative source of

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[2] *See* Arrest Warrant Application for John Ardell and Arrest Warrant Application for Eric Person, Appendices E and F, respectively. The warrants for petitioner's arrest and John Ardell's arrest, reveal that Jamie and Lauren discussed the alleged sexual abuse by their respective fathers. On February 3, 1987, when asked by their respective mothers, both girls stated that their respective fathers had asked them to suck their penises. Both girls went to the same school, shared the same social worker, Susie Laffette, who reported their respective complaints to police and the same pediatrician, Dr. Judith Hochstadt who reported her findings to police. Both girls were products of a divorce, who visited their fathers on weekends. *See* Appendices E and F, respectively.

Jamie's explicit sexual knowledge. Defense counsel wished to explore the details of the alleged assault of Lauren by her own father and an earlier incident of possible sexual assault involving her baby sitter for the purpose of proving the source of Jamie's knowledge of sexual activity. Defense counsel intended to rebut the state's theory that the only way that Petitioner's younger daughter could have learned of deviate sexual activity was from the actual abuse by her father. Further, defense counsel intended to demonstrate that Jamie got the idea of complaining against her father from Lauren. Defense counsel also wanted to show a motive and course of conduct by the two girls to sexually fantasize and fabricate accusations. (T. 11-24-87, 15-17). Defense counsel wanted to uncover Lauren's role in the filing of a criminal complaint against the Petitioner. Defense counsel stated that Lauren's testimony was vital to the defense, that the Petitioner was entitled to put his theory of defense before the jury and that the jury should have been allowed to decide whether Lauren was the true reason why a complaint was made against the Petitioner. (T. 11-24-87, 3).

The trial court prohibited any inquiry of Lauren Ardell except as to what Jamie Person told her concerning the activities of the Petitioner. The trial court ruled that any evidence as to what which Lauren Ardell may have told Jamie concerning Lauren's alleged sexual abuse by her father was irrelevant in the Petitioner's trial and that it would be a violation of Connecticut General Statute § 54-

86e[3] to question the friend on the specifics of the alleged sexual abuse by her father. (T. 11-24-87, 13).

The court denied post trial motions for a judgment of acquittal and to set aside the verdict as to these two counts. The Petitioner was sentenced to concurrent terms of ten years on each count. New counsel appeared for the Petitioner and a timely appeal was filed.

State Appellate Proceedings

On September 26, 1989, the Connecticut Appellate Court affirmed the conviction. *State v. Person*, 20 Conn. App. 115 (1989)(hereinafter "*Person I*")(App. D). The Petitioner presented seven (7) claims of error, only the following of which is relevant to this petition:

(1) Defendant was denied his right to present a defense and his right to confrontation when the trial court refused to allow the defendant to present evidence that the child complainant's best friend had accused her own father of conduct very similar to the conduct allegedly committed by the defendant.

The Appellate Court found no error in the trial court's

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[3] Connecticut General Statute § 54-86e provides:

The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72b or 53a-73a, or Injury or Risk of Injury, or Impairing of Morals under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused.

ruling prohibiting the Petitioner from presenting the evidence that Lauren Ardell, Petitioner's younger daughter's best friend, had made striking similar accusations of sexual abuse against her father. The Appellate Court relied in part on the trial court's ruling that evidence was not relevant. The Appellate Court refused to analyze Petitioner's claim that the exclusion of this evidence constituted an error of constitutional proportion. *Person I*, at 127 n.5. The Appellate Court held that Petitioner had not adequately briefed this as a claim of constitutional error as opposed to an error of state evidentiary law. *Id.*

After the Connecticut Appellate Court affirmed petitioner's conviction, the Connecticut Supreme Court refused to grant Certification on the question of whether the trial court's exclusion of the testimony from Lauren Ardell constituted a violation of petitioner's constitutional right to present a defense.[4]

Federal Habeas Corpus Proceedings

On April 26, 1991, the Petitioner filed a Petition for Habeas Corpus relief under 28 U.S.C. § 2254 in the United States District Court for the District of Connecticut. Petitioner raised the following claims, among others, in his petition:

Petitioner was deprived of his rights to compulsory

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[4] The Connecticut Supreme Court granted Certification on the issue of whether the prosecutor's repeated and improper questioning of a defense witness with the purpose of eliciting a Fifth Amendment privilege constituted a violation of the Due Process clause.

process and to present a defense when he was not allowed to present evidence that the child complainant's best friend had made strikingly similar accusations of sexual abuse against her own father.

On cross-motions for summary judgment, the District Court granted respondent's Cross-Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment. Ruling on Cross-Motion for Summary Judgment, August 6, 1991 (hereinafter "*Ruling*")(Appendix B).

As to Petitioner's claim that the exclusion of Lauren Ardell's testimony violated his constitutional right to compulsory process and to present a defense, the District Court first ruled that Petitioner had adequately briefed the claim to the Connecticut Appellate Court and that the claim was therefore not procedurally barred from habeas review. *Ruling*, at 14 n.4. The District Court then found that the exclusion of the testimony of the best friend of Petitioner's younger daughter who had made strikingly similar sexual abuse allegation about her own father just prior to the allegation made by Petitioner's younger daughter did not violate Petitioner's compulsory process rights under the Sixth Amendment. The District Court stated that "the trial court's exclusion [of Lauren Ardell's testimony] on the grounds of irrelevance, immateriality, and arguable privilege under Connecticut shield laws did not amount to a constitutional violation of Petitioner's right to present a defense." *Id.* at 17.

Thereafter, the Petitioner appealed to the Court of Appeals for the Second Circuit. The Second Circuit found that even though the evidence was material, as an arguable basis for impeaching the victim, the exclusion of this

evidence did not amount to a due process violation. *Order*, *Eric N. Person v. Larry R. Meachum*, Docket Number 91-2405 (February 18, 1992)(hereinafter "*Order*")(App. A). The Court of Appeals held that "its admissibility involved an assessment of numerous factors, including the burden of subjecting the young girlfriend to further questioning beyond the trial at which the girlfriend's father had been acquitted." *Id.* at 2. The Court of Appeals then cited its own decision, *Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir. 1988), as support for its conclusion that the exclusion of this evidence did not meet the test of depriving the petitioner of a fundamentally fair trial. *Id.*

Original federal jurisdiction in the District Court for the District of Connecticut was invoked under 28 U.S.C. § 2241 to bring a claim for habeas corpus relief under 28 U.S.C. § 2254. Appeal of the denial of habeas corpus relief by the District Court for the District of Connecticut was taken to the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 2253.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE EXCLUSION OF MATERIAL EVIDENCE CONCERNING DEFENDANT'S GUILT DID NOT AMOUNT TO A VIOLATION OF HIS SIXTH AMENDMENT RIGHTS UNDER THIS COURT'S HOLDINGS IN *CHAMBERS V. MISSISSIPPI* AND *WASHINGTON V. TEXAS.*

Our adversarial system of justice relies predominantly, if not completely, on the parties for the presentation and exploration of relevant facts. *United States v. Nobles*, 422 U.S. 225, 230, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). To that extent, "[t]he need to develop all *relevant* facts in the adversary system is both fundamental and comprehensive." *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). "The ends of justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Nixon*, *supra*, at 709. Within this framework, a number of this Court's decisions make clear that there are few more basic rights afforded a criminal defendant than the right to compulsory process; *see, Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), *citing*, *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972); *Washington v. Texas*, 388 U.S. 14, 18 (1972); and to confront witnesses against an accused. *see, Pointer v. Texas*, 380 U.S. 400, 406, 85

S. Ct. 1065, 13 L. Ed. 2d 923 (1965).[5] While the Constitution affords certain other protections in the face of criminal accusations, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9, L. Ed. 2d 799 (1963)(Sixth Amendment guarantee of counsel); *Miranda v. Arizona*, 384 U.S. 4365, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)(establishing procedures to protect Fifth Amendment privilege against self-incrimination);

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations, the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers at 294. As Justice Harlan stated in his concurrence in *California v. Green*, "[i]f anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense." *Id.*, 399 U.S. 149, 177, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

Although the decisions of this Court make clear that the right of confrontation and the right of compulsory process are not limitless, *see*, *Kentucky v. Stincer*, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)(Confrontation Clause not violated when defendant excluded from

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[5]The Sixth Amendment's Compulsory Process Clause and Confrontation Clause are binding on the states through the Fourteenth Amendment. *Washington v. Texas*, *supra*, 388 U.S. at 18; *Pointer*, *supra* 380 U.S. at 407.

competency hearing of child witness); *Maryland v. Craig*, ___ U.S. ___, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)(Scalia, J., *dissenting)*(Confrontation Clause not violated when child complainant allowed to testify via closed circuit television); *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)(Compulsory Process Clause not violated by ordering preclusion of defense witness' testimony as sanction for defense counsel's discovery rule violation), the decisions of this Court have defined certain essential components of the rights guaranteed by both the compulsory process clause and the confrontation clause. At a minimum, the compulsory process guarantees a defendant the right to present evidence, with the state's assistance if needed, to rebut the state's accusations. A criminal defendant must be able to call witnesses on his behalf and to allow the jury to weigh the evidence in its entirety.

> "The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."

Washington v. Texas, 388 U.S. at 18. Conversely, the right of Confrontation requires that a criminal defendant have the opportunity for *effective* cross-examination of the witnesses against him. *Pointer*, *supra*, 380 U.S. at 406. While a criminal conviction will not be constitutionally infirm because a criminal defendant has not opted to cross-examine a witness against him, the "absence of a proper confrontation of witnesses at trial calls into question the ultimate integrity of the fact-finding process." *Ohio v.*

Roberts, 488 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). A criminal defendant must have the opportunity "to show that a witness is biased, or that the testimony is exaggerated or unbelievable ... [as] this type of evidence can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In this case, the question for this Court is whether the trial court's exclusion of material evidence deprived the Petitioner of his Sixth Amendment right to present a defense and to confront the witnesses against him. The trial court violated Petitioner's right under the Compulsory Process Clause of the Sixth Amendment to present witnesses in his own defense, *Chambers*, *supra*, at 302; and excluded from the jury's consideration relevant and credible evidence which would tend to establish that the child complainant gained her knowledge of sexual activity from a source other than Petitioner. Lauren Ardell's testimony provided an acknowledged source for Jamie's knowledge of sexual activity other than actual sexual abuse. By restricting his ability to impeach the credibility of the State's primary witness by presenting evidence which would seriously undermine the complainant's accusations by demonstrating an alternative source of knowledge of sexual activity, *see e.g.*, *Davis v. Alaska*, 415 U.S. 308, 319-20, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the trial court deprived Petitioner of his right to confront the accusations of the state's witness. Petitioner claims that Lauren Ardell's testimony was so material to the presentation of his defense that the trial court's exclusion of this evidence deprived him of a fundamentally fair trial, in violation of his right to compulsory process, to present a defense and to effectively confront the only witness who

could directly implicate Petitioner in the alleged crime. *see e.g., Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir. 1988).

The Court of Appeals for the Second Circuit rejected the holdings of the Connecticut Appellate Court and the United States District Court for the District of Connecticut that Lauren Ardell's testimony was immaterial to impeaching Jamie Person's credibility. *See* Appendix A. However, having found that this evidence was material to Petitioner's defense, the Court of Appeals then held that the exclusion of this crucial evidence did not rise to a constitutional violation. *Order*, *supra*, at 2. The Court of Appeals cited its own decision *Rosario*, *supra*, 839 F.2d at 925, as support for the notion that the exclusion of evidence material to Petitioner's defense did not violate his constitutional rights. The Court of Appeals also held that "numerous factors," such as the burden of subjecting the young girlfriend to further questioning beyond the trial at which the girlfriend's father had been acquitted, justified the trial court's exclusion of material evidence. While material evidence may be excluded in certain limited circumstances, *See e.g.*, Rule 403 of the Federal Rules of Evidence (allows trial court to exclude relevant evidence on grounds of prejudice, confusion, or waste of time), the instant case does not fall within these limited circumstances. Moreover, a close examination of the evidence excluded in this case reveals it would have created a reasonable doubt. *United States v. Augrs*, 427 U.S. 97,

96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).[6]

The prosecutor argued extensively in summation that Jamie Person could not have gained her knowledge of sexual activity except through personal experience.[7] The jury may well have found Petitioner guilty solely because he failed to explain how Jamie developed an explicit

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[6] In *Augrs*, this Court addressed the issue of whether a prosecutor's failure to disclose exculpatory evidence pursuant to a general request for exculpatory evidence violated the defendant's due process rights. *Id.*, at 97. After determining that a prosecutor indeed had a constitutional duty to turn over such evidence to a defendant, this Court held that this duty extended only to material evidence. *Id.* at 112-13. As to the constitutional standard of materiality, this Court stated:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. *It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.* This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id., *supra*, at 112-13, (emphasis added; footnotes omitted). Petitioner argues that Lauren Ardell's testimony creates a reasonable doubt that did not otherwise exist.

[7] Appendix G.

knowledge of sexual activity. *see Commonwealth v. Ruffen*, 399 Mass. 811, 814, 507 N.E.2d 684 (Mass. 1987). Had the jury heard this evidence it could have found that Jamie got not only the idea of making up a sexual abuse story from Lauren, but also the knowledge to support the allegation.[8] The jury could also have found that the two girls were engaging in a childhood fantasy together and had fabricated the accusations. Because of the trial court's ruling that the evidence was irrelevant, however, the defendant was never able to examine Lauren on these subjects. That the two girls had fabricated the allegations, that Jamie gained knowledge of sexual activity from Lauren, and that Jamie got the idea of making these accusations from Lauren were essential to the defense at trial, because that information could have created a reasonable doubt in the minds of the jurors as to whether Jamie was actually abused. As trial counsel stated, it was "vital to the defense."

The exclusion of Lauren Ardell's testimony takes on added importance considering the age of the complainants in their respective cases. Jamie Person gave explicit testimony concerning various sexual acts. As the state argued in summation, the only source of Jamie's knowledge could have been at the hands of the Petitioner. However, as Justice Scalia noted in his dissent in *Maryland*

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[8] Petitioner also argues that whatever merit rests with the Court of Appeals' reasoning that Lauren Ardell's testimony could be excluded because of the "burden of subjecting her to further questioning" is ameliorated by the use of procedures for examining child witnesses which this Court found to be constitutional in the face of a Confrontation Clause challenge. *see*, *Maryland v. Craig*, *supra*, 111 S. Ct. 3171.

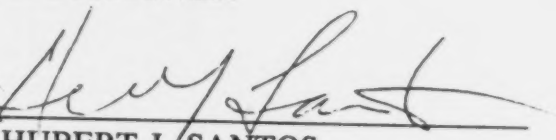
v. Craig, *supra*, 110 S.Ct. at 3175, "some studies show that children are substantially more vulnerable to suggestion than adults, and often more unable to separate recollected fantasy (or suggestion) from reality." *Id.* (*citing authorities*). In *Maryland*, Justice Scalia argued that problems of suggestiveness on the part of young children demanded that a defendant be allowed to confront the child complainant. *Id.*, *supra*, at 3176. Various state court have also examined the problem of childhood fantasy in allegations of sexual abuse. *See*, *Ruffen*, *supra*, 399 Mass. at 814-15; *State v. Oliver*, 158 Ariz. 22, 760 P.2d 1071 (1988); *Washington v. Carver*, 37 Wash. App. 122, 678 P.2d 842 (1984); *State v. Padilla*, 110 Wis.2d 414, 329 N.W.2d 263 (1982); *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981). The Supreme Judicial Court of Massachusetts reversed a defendant's conviction for sexually assaulting a young girl precisely because the trial court prevented him from presenting credible evidence demonstrating an alternative source of the young complainant's knowledge of sex. *Ruffen*, *supra*, 399 Mass. at 814-15. Petitioner in this case could not rebut the damaging testimony of an eight year old girl who described sexual acts explicitly.

Petitioner respectfully argues that the Court of Appeals' decision in this case is in contravention of this Court's decisions interpreting the scope of Petitioner's constitutional right to confront the witness against him, *Pointer*, *supra*, at 406, and to present evidence supporting his defense, *Chambers*, *supra*, at 302.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully urges this Court to grant certiorari and review each of the questions herein presented.

THE PETITIONER

BY 

HUBERT J. SANTOS
A Member of the Bar of
the Supreme Court of the
United States

No. _____

In The

Supreme Court Of The United States

October Term, 1991

ERIC N. PERSON,

Petitioner,

v.

LARRY MEACHUM,

Respondent.

APPENDIX

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APPENDIX A

Opinion of the Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February, one thousand nine hundred and ninety-two.

Conn.
B90-cv-579
Cabranes

PRESENT: HONORABLE JON O. NEWMAN
HONORABLE AMALYA L. KEARSE,
Circuit Judges.
HONORABLE THURGOOD MARSHALL,
Associate Justice Retired.*

ERIC N. PERSON
Petitioner - Appellant,
v.
LARRY R. MEACHUM, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF CORRECTION,
Respondent-Appellee.

---

* Of the United States Supreme Court, sitting by designation.

ORDER

Appeal from the United States District Court for the District of Connecticut (Jose A. Cabranes, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Eric N. Person appeals from the August 7, 1991, judgment dismissing, on motion for summary judgment, his petition for a writ of habeas corpus to challenge his state court conviction for sexually assaulting his daughter, in violation of Conn. Gen. Stat. § 53a-71-(a)(1) (1991), and risking injury to her as a minor, in violation of Conn. Gen. Stat. 53-21 (1991). The conviction was affirmed by the Connecticut Supreme Court. State v. Person, 215 Conn. 653, 577 A.2d 1036, (1190), cert. denied, 111 S.Ct. 756 (1991).

1. The prosecutor's questioning of the witness Mercier, precipitating the witness's invocation of the Fifth Amendment before the jury, did not constitute the sort of misconduct that might constitute a due process violation as contemplated by Perez v. Jones, 935 F.2d

480, 483 (2d Cir. 1991). There occurred neither the flagrant attempt to build a case out of inferences from invocation of the privilege nor the addition of inferences to add critical weight to the prosecution's case. See Namet v. United States, 373 U.S. 179 (1963). As the District Court Judge noted, there was no reasonable basis from which the jury could draw the inference that the defendant sexually abused his daughter from the fact that Mercier refused to answer questions about smoking marijuana in the presence of the defendant and his daughter.

2. The claim that evidence offered by the defendant was improperly excluded does not establish a due process violation, even if we assume that the claim has not been forfeited for failure to present it to the Connecticut Appellate Court in the defendant's main brief. The defendant sought to prove through the testimony of the victim's girlfriend that the girlfriend's account of the alleged sexual assault upon her by the girlfriend's father was the likely source of the victim's knowledge of certain details of sexual activity. The victim testified that her knowledge stemmed from the defendant's assault upon her. Though we do not doubt that this evidence was material as an arguable basis for impeaching the victim, its admissibility involved an assessment of numerous factors, including the burden of subjecting the young girlfriend to further questioning beyond the trial at which the girlfriend's father had been acquitted. The exclusion of this evidence did not meet

the test of depriving the defendant of a fundamentally fair trial. See Rosario v. Kuhlman, 839 F.2d 918, 925 (2d Cir. 1988).

3. The prosecutor's questioning of various witnesses (not including the defendant) about their marijuana use and asking a character witness for the defendant whether his opinion would change if he were aware of defendant's use of marijuana did not constitute the sort of prosecutorial misconduct cognizable on habeas corpus, in view of the emphatic curative instruction by the trial judge that whether the defendant had ever smoked marijuana was "totally irrelevant" and should be disregarded. See Blissett v. Lefevre, 924 F.2d 434, 440 (2d Cir.), cert. denied, 112 S.Ct. 158 (1991).

_____

_____
Circuit Judges.

_____
Associate Justice.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

Opinion of the District Court for the District of Connecticut

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ERIC N. PERSON	:	
	:	
V.	:	Civil No. B-90-579 (JAC)
	:	
LARRY R. MEACHUM, Commissioner, Department of Correction	:	

Appearances:

HUBERT J. SANTOS
(Santos, Peck & Smith)
Hartford, CT

Counsel for Petitioner

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Appellate Unit)
Office of the Chief State's
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Wallingford, CT

Counsel for Respondent

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

JOSE A. CABRANES, District Judge:

Petitioner Eric N. Person, who is currently serving two concurrent ten-year terms of imprisonment at the Connecticut Correctional Institution at Somers, has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, arguing that he is currently in state custody in violation of his constitutional right to due process. On January 26, 1988, a judgment of conviction was entered against him in Connecticut Superior Court, Judicial District of Danbury, after a jury found him guilty of sexually assaulting his younger daughter, in violation of Conn. Gen. Stat. § 53a-71(a)(1), and of risking injury to a minor, in violation of Conn. Gen. Stat. § 53-21. The

jury also acquitted petitioner of two counts - of sexual assault and of risk of injury - with respect to this older daughter.

Both parties have moved for summary judgment. At a hearing and oral argument on June 17, 1991, the parties agreed that there exist no issues of material fact in dispute requiring an evidentiary hearing. After I permitted both parties to submit post-hearing supplemental memoranda, this matter was deemed submitted for decision.

I. BACKGROUND

The State of Connecticut formally commenced prosecution of petitioner when it filed an information naming him on November 6, 1987. The information charged petitioner with sexually assaulting both of his

daughters. With respect to his eight-year-old daughter,[1] he was charged with one count of sexual assault in the second degree and one count of risk of injury to a minor; with respect to his sixteen-year-old daughter, he was charged with one count of sexual assault in the fourth degree and one count of risk of injury to a minor. Petitioner was tried before a jury of six between November 12, 1987 and December 9, 1987, and the Honorable Patricia A. Geen presided over eleven days of testimony. On December 15, 1987, the jury returned its verdict of "guilty" on the two counts relating to the younger daughter and "not guilty" on the two counts relating to the older daughter.

---

[1] The child was eight at the time of the trial, but the events to which she testified occurred when she was between the ages of five and seven.

Judge Geen denied petitioner's motion to set aside the verdict and for acquittal, concluding that "the verdict was more than substantiated by the evidence." Trial Transcript (Appendix A to Petitioner's Memorandum in Support of Motion for Summary Judgment (filed Apr. 26, 1991) (Petitioner's Memorandum")) ("tr.") (Jan. 26, 1988) at 5. Judge Geen sentenced petitioner to the custody of the respondent for a period of ten years of each of the two counts, to be served concurrently. Id. at 30.

Petitioner appealed from his conviction to the Appellate Court of Connecticut. He raised seven claims of error on appeal:

(FIRST) That the Court erred in permitting the state prosecutor's repeated elicitation of the Fifth Amendment

privilege from a key defense witness in the presence of the jury; and the prosecutor was guilty of misconduct when she not only knew that the witness would invoke the privilege but she made reference to the invocation of the privilege in recross-examination and during closing arguments;

(SECOND) That the court erred in prohibiting defendant from presenting expert witnesses to testify that he did <u>not</u> fit the profile of a pedophile or of a sexual deviate;

(THIRD) That the court erred by refusing defendant's request to present

evidence that his younger daughter's best friend had accused her own father of conduct similar to that of which petitioner was accused;

(FOURTH) That the court erred in admitting into evidence an audiotaped interview between a police detective and the victim and in permitting the jury to take the tape into the jury room during the deliberations;

(FIFTH) That the court erred in permitting two police detectives to give opinions concerning the victim's credibility and concerning

"common pattern" evidence in child abuse cases;

(SIXTH) That the court erred in twice refusing to grant a mistrial following the prosecutor's intentional and improper questioning concerning the use of marijuana at petitioner's apartment; and

(SEVENTH) That the court erred in admitting hearsay testimony that the defendant's sister had told his older daughter not to testify and then in advising the defendant's sister, while in the presence of the jury, of

her privilege against self-

incrimination.

See State v. Person, 20 Conn. App. 115, 118-33, 564 A.2d 626, 629-36 (1990). The Appellate Court affirmed the conviction. A motion for reargument en banc was denied, and the petitioner filed a petition of certification to the Connecticut Supreme Court. The Connecticut Supreme Court granted petitioner's motion for certification, limited to the following issues:

> (1) May the state, in a criminal prosecution, require a defense witness to invoke the privilege against self-incrimination in open court, and may it use such invocation an subsequent waiver as a basis for impeaching the witness and for adverse comment it its summation?
>
> (2) If the trial court's ruling to permit such conduct was erroneous, was the Appellate Court correct in concluding that the error was harmless?

State v. Person, 213 Conn. 811, 568 A.2d 796 (1990).

The Connecticut Supreme Court affirmed petitioner's conviction on July 17, 1990. State v. Person, 215 Conn. 653, 577 A.2d 1036 (1990). Petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on January 14, 1991. Person v. Connecticut, 111 S.Ct. 756 (1991).

On November 15, 1990, petitioner filed his petition for habeas corpus. Although the original petition raised the seven claims of error originally raised before the Appellate Court, petitioner has chosen to pursue only three of the original seven claims. These are: (1) That petitioner was deprived of his rights under the Fourteenth Amendment from Dean Mercier ("Mercier"), a key defense witness; (2) that petitioner was deprived of his rights to compulsory process and to present a defense when he was not allowed to examine his younger

daughter's best friend on concerning similar accusations of sexual abuse about her own father; and, finally, (3) that petitioner was denied his right to a fair trial by the prosecutor's repeated questioning of various witnesses concerning the use of marijuana at petitioner's apartment.

II. DISCUSSION

Erroneous evidentiary rulings do not automatically rise to the level of constitutional error. The court's duty on a petition for habeas corpus is to determine whether the error was sufficiently material so as to deprive the petitioner of fundamental fairness. Rosario v. Kuhlman, 839 F.2d 918, 924 (2d Cir. 1988). A writ of habeas corpus may issue only where the petitioner can show that the error deprived him of a fundamentally fair trial. See Taylor v. Curry, 708 F.2d 886, 891 (2d Cir.), cert.

denied, 464 U.S. 1000 (1983); see also Rosario, 839 F.2d at 925.

A. Invocation of the Fifth Amendment Privilege

At trial, petitioner called several witnesses who spent time at his apartment to testify that they never observed any unusual or improper activity between him and his daughter. Mercier, who was petitioner's best friend, testified that he was often in petitioner's apartment when his daughter was visiting and that he never observed any unusual behavior between the petitioner and his daughter and that he believed that they had a good relationship. State v. Person, 215 Conn. at 657, 577 A.2d at 1038. On cross-examination, the following colloquy took place:

> Q: Well, how sharp would you say your perception of events taking place in the apartment was at the -- between the dates in question?

A: Very sharp.

. . . .

Q: Well, isn't true, sir, that with regard to your powers of perception while you were at the defendant's apartment during the dates in question, that you were frequently smoking marijuana --

Tr. (Dec. 3, 1987) at 76-77.

The petitioner objected to this question, and Judge Geen excused the jury. After the court ruled that the prosecutor's question was proper because smoking marijuana "has a bearing upon the ability of a person to remember and relate," id. at 80, Mercier requested the opportunity to consult with his attorney. After he was recalled for cross-examination and the prosecutor once again asked him about his marijuana use, Mercier invoked his privilege against self-incrimination. Id. at 111. The prosecutor asked ten questions relating to the

use of marijuana, and to each question, Mercier invoked his Fifth Amendment privilege.

On the following day, petitioner recalled Mercier to the stand, and he waived his Fifth Amendment privilege. Tr. (Dec. 4, 1987) at 5. During recross-examination, the prosecutor inquired of Mercier whether he changed his answer because he learned that he could not be prosecuted for his marijuana use. Id. at 9-10. Mercier responded that his prior invocation of his privilege resulted from his confusion during cross-examination. The prosecutor continued by asking a series of questions designed to demonstrate an inconsistency between Mercier's prior invocation of his Fifth Amendment privilege and his present denial of marijuana use at the petitioner's apartment.

The Connecticut Appellate Court concluded, and respondent has conceded, that "it was improper for the trial court to permit recross-examination for the purpose of establishing inconsistency between the implications of Mercier's assertion of the privilege against self-incrimination and his subsequent testimony that he had not used marihuana in the defendant's apartment." Person, 20 Conn. App. at 123, 564 A.2d at 631. However, the Appellate Court also concluded that the error was harmless. Id.; see also Person, 215 Conn. at 660, 577 A.2d at 1040 (Connecticut Supreme Court concluding that petitioner has not met burden of demonstrating that erroneous action was harmful). "[T]he jury could reasonably have believed the testimony of both Mercier and the victim and still have found the defendant guilty." Id. at 664, 577 A.2d at 1041.

There are essentially two questions before me: First, was the error committed by the prosecutor purely "evidentiary" or could it implicate petitioner's constitutional right to due process of law for which habeas corpus relief is appropriate? Second, if the error could be a constitutional violation, were petitioner's due process rights in fact violated?

1. Has Petitioner Alleged a Constitutional Violation?

In Namet v. United States, 373 U.S. 179 (1963), the Supreme Court considered the question of whether the trial court committed reversible error in permitting the Government to question witnesses about whether they engaged in criminal activity with the defendant after it was known that they were going to claim their privilege not to incriminate themselves. The Court held that

reversible error can occur when either "the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege," id. at 186, or when, "in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and this unfairly prejudiced the defendant," id. at 187; see also United States v. Casamento, 887 F.2d 1141, 1186 (2d Cir. 1989), cert. denied, 110 S.Ct. 1138 (1990); Rado v. Connecticut, 607 F.2d 572, 581 (2d Cir. 1979), cert. denied, 447 U.S. 920 (1980); United States v. Maloney, 262 U.S. 535, 537 (2d Cir. 1959).[2]

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[2]Namet was an appeal from a conviction in federal court for violation of federal wagering tax laws. The standard was whether of not the prosecution committed reversible error. Under the facts or Namet, the Court held that no reversible error was committed, and it affirmed the conviction. In this case, the question presented is

Respondent argues that the Court in Namet "ruled unequivocally that a criminal defendant on direct appeal presents no constitutional claim when a witness, other than the defendant, is forced to plead the fifth amendment before the jury." See Respondent's Brief in Opposition to Motion for Summary Judgment and in support of his Motion for Summary Judgment (filed May 22, 1991) ("respondent's Brief") at 10-11. Although the Court in Namet determined that "[n]o constitutional issues of any kind [were] presented," Namet, 373 U.S. at 185, it is not clear whether the Court concluded that such a claim could never raise constitutional issues or whether it was simply not presented as a constitutional claim in that particular case. See Petitioner's Memorandum at 4.

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whether Namet error can ever amount to constitutional error.

In Casamento, our Court of Appeals stated that "[t]he due process rights of a defendant may be violated" when one or both prongs of the Namet rule are satisfied. Casamento, 887 F.2d at 1186. In other words, if the prosecutor consciously and flagrantly attempts to build the Government's case out of inferences arising from the invocation of the privilege or if inference from a witness' refusal to answer added "critical weight to the prosecution's case," Namet, 373 U.S. at 186-87, the defendant's due process rights would be violated.

The Connecticut Supreme Court concluded that the error in this case could only have been evidentiary error, because it interpreted Namet to mean that it was never constitutional error to cause a defense witness to invoke his Fifth Amendment privilege against self-incrimination in the presence of a jury. Person, 215

Conn. at 659, 577 A.2d at 1039. Furthermore, it held that attempting to impeach a witness through use of that witness' prior invocation of his Fifth Amendment does not rise to a constitutional level even if harm results because the harm involves another's exercise of a constitutional privilege rather than a constitutional privilege of the defendant." Id. at 660, 577 A.2d at 1039.

I cannot concur with this holding of the Connecticut Supreme Court. Whether or not a Namet violation amounts to a violation of due process depends on the circumstances of the case. It is a misreading of Namet to conclude that a prosecutor's repeated elicitation of the Fifth Amendment privilege from a defense witness in the presence of the jury could never deprive a defendant of a fundamentally fair trial. As a purely

jurisdictional matter, I shall entertain petitioner's application, for he has indeed alleged a violation of his rights under the Due Process Clause of the Fourteenth Amendment. The next question is whether or not his constitutional rights were in fact violated.

2. Was Petitioner Deprived of Due Process?

As our Court of Appeals stated in Casamento, petitioner's due process rights may be violated (1) when the prosecution commits misconduct by consciously or flagrantly attempting to build its case out of the inferences arising from the invocation of the testimonial privilege; or (2) when inferences from a witness' refusal to answer added critical weight to the prosecution's case. Casamento, 887 F.2d at 1186 (quoting Namet, 373 U.S. at 186-87).

It is clear that the prosecutor's intent in cross-examining Mercier on his use of marijuana was to impeach his testimony that he was able accurately to perceive the petitioner's behavior with his younger daughter while he was with them in petitioner's apartment and that he could effectively recall his perceptions on the witness stand. But "[w]hen a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused." United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959) (L.Hand, J.). In Namet and in Casamento, the witness invoked their Fifth Amendment privileges when questioned about criminal activity in which they had allegedly engaged with the defendant. In those cases, the defendants argued that the invocation of the privilege "naturally"

gave rise to the inference that the defendants engaged in the criminal conduct.

In this case, the only inference that reasonably could have been drawn is that defendant permitted and possibly joined Mercier in the smoking the marijuana while in the presence of his younger daughter. As the Connecticut Supreme Court reasons, "[w]ithout any logical nexus between the charges pending against the defendant and the subject matter about which Mercier was questioned, there was no reasonable basis from which the jury could draw an inference of defendant's guilt." Person, 215 Conn. at 663, 577 A.2d at 1041. It is simply unreasonable to believe that the jury might have drawn the inference that the petitioner sexually abused his daughter because it had already drawn the inference that petitioner smoked marijuana in her

presence. Had petitioner been on trial for smoking marijuana in the presence of a minor, the prosecutor's conduct might have been sufficient to violate petitioner's due process rights. Under the circumstances of this case, however, no due process violation occurred.

Mercier's subsequent decision to waive his Fifth Amendment privilege -- and to deny that he ever used marijuana in the petitioner's apartment while the petitioner's younger daughter was present -- and the prosecutor's inquiry concerning the apparent inconsistency between his prior invocation of the privilege and his subsequent testimony did not prejudice the petitioner. At most, the prosecutor raised significant doubts about Mercier's credibility. But he was not the only witness who testified as to the seemingly normal relationship between father and daughter; even if

Mercier's credibility was unfairly placed into doubt, his testimony was cumulative.

Even more importantly, Mercier's refusal to answer added little if anything to the weight of the State's evidence against the petitioner, which was built almost entirely on the shocking testimony of petitioner's eight-year-old daughter. Based on the entire record, the prosecutor's conduct with respect to the questioning of Mercier, although found to be "highly inappropriate" as a matter of state law, Person, 215 Conn. at 661, 577 A.2d at 1040, simply did not amount to the deprivation of his rights to a fundamentally fair trial.[3]

---

[3] Although petitioner and respondent have argued vigorously over which side would bear the burden of proving harmlessness beyond a reasonable doubt compare Petitioner's Supplemental memorandum (filed June 21, 1991) with Respondent's Supplemental Memorandum (filed June 27, 1991), that question is only reached after it is determined that a constitutional error has occurred. Because I have found that there was no so-called Namet error, I

B. Compulsory Process

Petitioner's second ground for habeas corpus relief is that he was deprived of his right to compulsory process guaranteed under the Sixth Amendment and made applicable to the states through the Fourteen Amendment. Specifically, petitioner claims that his right to present a defense were violated by the trial judge's refusal to permit evidence that the best friend of petitioner's younger daughter had made "extremely similar sexual abuse allegations about her own father." Petitioner's Memorandum at 11.[4]

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need not engage in harmless-error analysis under Chapman v. California, 386 U.S. 18 (1967).

[4]Respondent argues that petitioner's second claim for relief is procedurally barred because he did not adequately raise this argument before the Appellate Court. The argument is without merit. Even a cursory review of petitioner's reply memorandum to the Appellate Court reveals that he indicated the federal nature of his claim, thereby preserving his right to raise it in a petition for habeas

Petitioner's whole defense was based on the theory that his younger daughter learned about explicit sexual activity from watching adult movies on television and from hearing stories from her best friend. Tr. (Nov. 24, 1987) at 16. Judge Geen ruled that any testimony by the friend about her own experiences of sexual abuse would be irrelevant, immaterial, and in violation of Connecticut General Statutes sections 54-86d and 54-86e.[5] Id. at 19.

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corpus. See Appellant's Reply Brief (Appendix E to Petitioner's Memorandum) at 11.

[5]Section 54-86d reads in pertinent part that

> [a]ny person who has been the victim of sexual assault . . . shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault . . . provided that the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding; (2) the identity of the victim has been satisfactorily established; and (3) the current address of the victim is made available to the defense.

Conn. Gen. Stat. § 54-86d (1985).

A defendant's right to call witnesses is not unlimited and must comply with established rules of evidence, see Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Petitioner's right to pursue his defense was limited by laws designed to protect the identity of victims of sexual assault.[6] But more importantly, the testimony of the child's friend was irrelevant and immaterial. As

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Section 54-86e reads as follows:

> The name and address of the victim of a sexual assault . . . shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused.

Conn. Gen. Stat. § 54-86e (1985).

[6]Judge Geen concluded that the best friend was a member of the class of persons protected by the Connecticut shield laws. She was the complainant in a separate criminal action, see Application for Arrest Warrant (Appendix C to Petitioner's Memorandum), and the statutes themselves are broadly worded. "They are clear, they are plan. She is not to be questioned, give her name and address and go into a set of questions about any sexual assault of her. Otherwise, the statute would be absolutely, totally useless." Tr. (Nov. 24, 1987) at 13.

the Connecticut Appellate Court stated when affirming the petitioner's conviction,

> [t]he [petitioner's] argument rests upon an assumption that the victim's credibility would somehow automatically be placed in question by evidence of the fact that she had a friend who claimed, as did she herself, to have been the victim of sexual abuse. There is no necessary logical link, however, between the fact that the victim of sexual abuse and a conclusion that the victim might therefore be an unreliable witness whose testimony regarding the [petitioner's] actions was not worthy of belief.

State v. Person, 20 Conn. App. at 127-28, 564 A.2d at 633-34.

In the affidavit in support of the arrest warrant for the best friend's father, the affiant wrote that he spoke with her along and that she "did not have any concept of ejaculation." Application for Arrest Warrant (Appendix C to Petitioner's Memorandum) at 3. In contrast, during

her direct examination, petitioner's daughter testified as follows:

> Q. And, what would happen?
> A. Well, I would feel the gooey stuff come in my mouth, and I would try to spit it out, but it just went down my throat.
> Q. What was the gooey stuff like?
> A. Well, it was sort of whitish -- whitish clearish, and it would be gooey and sticky and everything.

Tr. (Nov. 12, 1987) at 39.[7] As Judge Geen acknowledged before sentencing the petitioner and after presiding over the entire trial:

> There was an effort, a good effort, made by the defense to try to show that the youngster was relaying what she had seen on Playboy Channel Television, pornographic in nature. That defense didn't work because on television you do not have touch, feel. That little girl was able to

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[7]This was not an isolated reference to explicit sexual contact in the testimony of petitioner's daughter. Indeed, her testimony is replete with similar references. See, e.g., Tr. (Nov. 12, 1987) at 40, 41-42, 43-44, 45, 53.

> describe a physical ejaculation, the feel of seman [sic], its color, in the way nobody could do except if it had happened to them.
>
> . . . Her statement to the police in February and her evidence in court in December [sic] was consistent, but not rote. There were differences in words, differences in expressions, but consistency of factual recitation of the overall history with her father. There's no doubt in my mind that it happened and that the defendant is guilty.

Tr. (Jan. 26, 1988) at 25. The trial court's exclusion of the testimony of the daughter's best friend on grounds of irrelevance, immateriality, and arguable privilege under Connecticut shield laws did not amount to an unconstitutional violation of petitioner's right to present a defense.

C. Questioning Concerning Use of Marijuana

Petitioner argues as his third ground for habeas corpus relief that the prosecutor's deliberate, intentional

and improper questioning concerning the use of marijuana at this apartment violated his due process rights because it rendered the trial fundamentally unfair. Petitioner's Memorandum at 14.

The first time the issue of marijuana was raised was when the prosecutor asked petitioner's younger daughter whether her father smoked anything other than cigarettes. Tr. (Nov. 12, 1987) at 59. After dismissing the jury, Judge Geen ruled that the question of petitioner's use of marijuana was irrelevant to the allegations of sexual abuse, but she also denied petitioner's motion for a mistrial. Id. at 62. When the jury returned, Judge Geen gave the following cautionary instruction: "All right. Now, ladies and gentlemen, we've had our little legal discussion. Therefore, I just want to tell you that you are to ignore and strike from

your mind any questions about smoking cigarettes or anything else." Id. at 63.

Petitioner argues, however, that this asserted prosecutorial "misconduct was not limited to one isolated incident, but was repeated throughout the trial." Petitioner's Memorandum at 15. Not only did the prosecutor engage in the colloquy with Mercier discussed previously, but she also asked Joseph Marzullo, petitioner's landlord, whether it would change his generally favorable opinion of the relationship between petitioner and his daughter if he "knew that the defendant would regularly smoke marijuana in front of the children." Tr. (Nov. 24, 1987) at 93. After excusing the jury, Judge Geen once again sustained petitioner's objection while denying his motion for a mistrial. Upon

the jury's return, Judge Geen gave another cautionary instruction:

> Now, ladies and gentlemen, with reference to the question as to whether the witness had ever heard of whether or not Mr. person had ever smoked marijuana exclude that from your mind. That's totally irrelevant in this particular case, and in these proceedings up to this point, there is nothing involved with that. And, therefore, you are to disregard that question.

Id. at 99.

Petitioner argues that the prosecution's repeated questioning about the use of marijuana was particularly damaging because petitioner was being tried for risk of injury to a minor in violation of Connecticut General Statute section 53-21.[8] Petitioner argues that the jury

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[8]Section 53-21 reads as follows:

> Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to

could have convicted him of risking the injury of his younger daughter simply on the basis of the inference drawn from the prosecutor's improper questions about marijuana smoking in petitioner's apartment.

Although Judge Geen herself recognized this as a possible danger, see Tr. (Dec. 3, 1987) at 79, the Connecticut Supreme Court explicitly stated that "[s]uch an inference of guilt is not reasonable in this case, however, because the specifications of the charges against the defendant were exclusively acts of a sexual nature." Person, 215 Conn. at 663, 577 A.2d at 1041. Furthermore, Judge Geen's instructions cured any

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be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years of both.

Conn. Gen. Stat. § 53-21 (1985).

confusion that the jury might have felt. Based on the full record of the trial, there is no question that the jury found petitioner guilty of violating section 53-21 based on the evidence of sexual abuse.

The fact that the jury acquitted petitioner on the two counts charging him with risk of injury and sexual assault of the older daughter suggests that he petitioner was not confronted with insurmountable prejudice on the part of the jury. On the contrary, a review of the full record of this case leads inescapably to the conclusion that petitioner received a fundamentally fair trial. As the Supreme Court has repeatedly state, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Rose v. Clark, 480 U.S. 570, 579 (1986); United States v. Hasting, 461 U.S. 499, 508-09 (1983).

III. CONCLUSION

The foregoing reasons, petitioner's Motion for Summary Judgment (filed Apr. 26, 1991) is DENIED and respondent's Cross-Motion for Summary Judgment (filed May 22, 1991) is GRANTED. Judgment shall enter in favor or respondent.

In light of the court's ruling, petitioner Renewed Motion to Set Bail pending resolution of the petition for habeas corpus is DENIED as moot.

It is so ordered.

Dated at New Haven, Connecticut, this 6th day of August, 1991.

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Jose A. Cabranes
United States District Court

APPENDIX C

Opinion of the Connecticut Supreme Court

ing that the experimental conditions were not materially different and, therefore, it was not an abuse of discretion to admit the chart.

The judgment of the trial court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ERIC N. PERSON (13868)

PETERS, C. J., SHEA, CALLAHAN, COVELLO and HULL, Js.

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child, in connection with incidents involving his daughter, the defendant appealed to the Appellate Court. He claimed, inter alia, that the trial court should not have refused to allow a defense witness, M, to invoke his fifth amendment privilege against self-incrimination outside the presence of the jury when he was asked whether he had ever smoked marihuana in the defendant's apartment, and that it should not have permitted the state to use his invocation of that privilege before the jury and a subsequent waiver of the privilege as a basis for impeaching M's testimony. The Appellate Court affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Held:*

1. The defendant did not meet his burden of showing that it was more probable than not that the result of his trial was affected by the trial court's evidentiary rulings concerning M's invocation of the privilege, which rulings the state conceded were improper; the substance of M's testimony was remote from the central issue in the case, it was highly unlikely that the jury was confused by the testimony to such an extent that it subconsciously linked the defendant to M's assertion of the privilege and, since other witnesses presented testimony similar to M's, M's testimony was cumulative.
2. The defendant could not prevail on his claim, raised for the first time on appeal, that the state should not have been permitted, in summation, to attack M's credibility by referring to the invocation of the privilege; this court could not say that in the context of the entire trial the summation remarks, which were inappropriate, constituted a manifest injustice to the defendant so as to impair the effectiveness or integrity of his trial.

Argued May 3—decision released July 17, 1990

Information charging the defendant with the crimes of sexual assault in the second degree, sexual assault

in the fourth degree and two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Geen, J.;* verdict and judgment of guilty of sexual assault in the second degree and of one count of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Spallone, Daly,* and *Foti, Js.,* which affirmed the trial court's decision and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Hubert J. Santos, for the appellant (defendant).

Harry Weller, assistant state's attorney, with whom were *Mary Elizabeth Baran,* assistant state's attorney, and, on the brief, *Walter D. Flanagan,* state's attorney, and *Ted Diament,* law student intern, for the appellee (state).

HULL, J. The defendant, Eric N. Person, was charged with sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1),[1] sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (D)[2] and two counts of risk of injury to a child in violation of General Statutes § 53-21.[3] Fol-

[1] General Statutes § 53a-71 provides in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age . . . ."

[2] General Statutes § 53a-73a provides in pertinent part: "(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is . . . (D) less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare . . . ."

[3] General Statutes § 53-21 provides: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

lowing a jury trial, he was convicted of sexual assault in the second degree and one count of risk of injury to a child and acquitted of the other two charges. The trial court thereupon sentenced the defendant to concurrent ten year terms of imprisonment on the two counts. The Appellate Court affirmed the judgment of conviction and determined, inter alia, that: (1) the defendant was not unfairly prejudiced when the trial court permitted a defense witness to invoke his fifth amendment privilege against self-incrimination in the presence of the jury; and (2) it was harmless error for the trial court to permit recross-examination of the witness regarding his prior fifth amendment invocation for the purposes of impeaching the witness' credibility. *State* v. *Person*, 20 Conn. App. 115, 123, 564 A.2d 626 (1989). This court granted the defendant's petition for certification to appeal from the decision of the Appellate Court, limited to the following issues: "(1) May the state, in a criminal prosecution, require a defense witness to invoke the privilege against self-incrimination in open court, and may it use such invocation and subsequent waiver as a basis for impeaching the witness and for adverse comment in its summation?" and "(2) If the trial court's ruling to permit such conduct was erroneous, was the Appellate Court correct in concluding that the error was harmless?" *State* v. *Person*, 213 Conn. 811, 568 A.2d 796 (1990). We conclude that the trial court should not have permitted the conduct but that no prejudice resulted. Accordingly, we affirm the decision of the Appellate Court.

Although the facts are set forth in the decision of the Appellate Court; *State* v. *Person*, supra, 20 Conn. App. 115; we discuss those facts pertinent to the issues. On March 25, 1987, the defendant was arrested and charged with sexual assault in the second degree and risk of injury to a child in connection with sexual acts allegedly

perpetrated against the younger of his two daughters. In addition, he was charged with sexual assault in the fourth degree and risk of injury to a child in connection with alleged sexual conduct involving his older daughter. At trial, the younger victim (hereinafter the victim) testified that following her parents' divorce she would regularly visit the defendant on the weekends at his apartment in Danbury. She stated that during these weekend visits, the defendant would take her into his bedroom and engage in various sexual acts with her. On one occasion he forced the victim to engage in sexual activity in his car. The victim described these acts in graphic detail and used anatomically correct dolls to demonstrate the sexual activity.

The victim's physician, a pediatrician, provided constancy of accusation testimony. Further, the physician testified that in her opinion the physical condition of the victim's genital area was consistent with the victim's allegations of sexual assault. Constancy of accusation testimony was also provided by the victim's mother and two police officers who had investigated the matter.

Various defense witnesses testified that while present at the defendant's apartment in Danbury, they had observed no unusual behavior between the defendant and the victim. Other witnesses stated that the defendant appeared to be a good father who had a positive relationship with the victim. The defendant testified in his own defense and denied the victim's accusations.

The defendant challenges the Appellate Court's conclusions regarding three incidents of alleged prosecutorial misconduct. We consider first the challenged prosecutorial conduct that occurred during the presentation of the defendant's case and second the challenged conduct that occurred during the state's closing argument.

I

The defendant asserts that he was denied a fair trial when a defense witness was required to invoke his privilege against self-incrimination in the presence of the jury. Immediately following the defendant's testimony, Dean Mercier was called to testify on behalf of the defense. Mercier stated that he was a good friend of the defendant and that he had frequently visited the defendant's apartment during the time the sexual assaults allegedly had occurred. Mercier further testified that he had never observed any unusual behavior between the defendant and the victim and that in his opinion, the defendant and the victim had a good relationship. He did state, however, that he had only had occasion to go into the defendant's bedroom while the defendant and the victim were napping.

On cross-examination, the state inquired as to Mercier's ability to perceive events while present at the defendant's apartment. In response Mercier stated that his perception was "very sharp." The state then posed the following question: "Well, isn't it true, sir, that with regard to your powers of perception while you were at the defendant's apartment during the dates in question, that you were frequently smoking marihuana—?" The defendant objected to this question, and the court excused the jury.

Outside the presence of the jury, the state argued that the inquiry was relevant to the witness' ability to observe and perceive events. The defendant argued that the attempted introduction of the witness' marihuana use was inflammatory and prejudicial to the defendant and thereupon moved for a mistrial. The court overruled the objection and denied the motion for a mistrial. The court stated that although the question would have been improper if asked of the defend-

ant, it was permissible to inquire about marihuana use of a witness, because the question "has a bearing upon the ability of a person to remember and relate."

Mercier expressed concern that his answer to the pending question might incriminate him and asked for an opportunity to consult with his attorney. He left the witness stand. When, shortly thereafter, he resumed the witness stand, he stated that he had been unable to contact his attorney, but that he would answer the question anyway. The court, however, advised Mercier to refrain from further testimony until after he had obtained proper legal advice. The witness was then excused.

Mercier was later recalled for cross-examination. Outside the presence of the jury, he informed the court that he had been advised not to answer any questions relating to marihuana use. The defendant requested that Mercier's invocation of his fifth amendment privilege occur without the jury present, reasoning that its inflammatory and prejudicial nature outweighed its probative value. The court denied the defendant's request.

Following the jury's return, the state proceeded to engage in a litany of questions regarding Mercier's use of marihuana and alcohol. The defendant adamantly objected throughout the cross-examination, but the court overruled the majority of the objections. Mercier asserted his fifth amendment privilege against self-incrimination in response to ten questions.

The defendant also contends that he was denied his right to a fair trial when the state sought to impeach Mercier during recross-examination based upon his prior invocation of the fifth amendment privilege. Subsequent to Mercier's initial testimony, the defendant recalled Mercier who stated that he was waiving his fifth amendment privilege against self-incrimination.

Mercier testified that he had never smoked marihuana at the defendant's apartment while the victim was there.

During recross-examination, the state inquired whether Mercier's decision to waive his fifth amendment privilege was a result of newfound knowledge that he could not be prosecuted for marihuana use revealed at the trial. Mercier stated that such knowledge had no bearing on his decision and that his prior invocation had primarily resulted from his confusion during cross-examination. The state asked numerous questions designed to imply that there was an inherent inconsistency between Mercier's prior invocation of his fifth amendment privilege and his present denial of marihuana use at the defendant's apartment. The defendant objected several times during the recross-examination, but again the court permitted the state's line of questioning.

At the outset, we note that although the defendant has framed these claims in terms of a denial of his due process right to a fair trial, the claims do not present constitutional issues. "Clearly, the defendant ' "has put a constitutional tag on . . . nonconstitutional evidentiary ruling[s]." *State* v. *Douglas,* 203 Conn. 445, 455, 525 A.2d 101 (1987) . . . .' *State* v. *Vilalastra,* [207 Conn. 35, 46, 540 A.2d 42 (1988)]; *State* v. *Vitale,* 197 Conn. 396, 403, 497 A.2d 956 (1985); *State* v. *Gooch,* 186 Conn. 17, 18, 438 A.2d 867 (1982)." *State* v. *Walker,* 215 Conn. 1, 5, A.2d (1990). First, with regard to a claim of error in requiring a defense witness to invoke his fifth amendment privilege against self-incrimination in the presence of the jury, the United States Supreme Court has held that "[n]o constitutional issues of any kind are presented" if such action is challenged, rather, it "is a claim of evidentiary trial error." *Namet* v. *United States,* 373 U.S. 179, 185, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Second, an attempt to

impeach a witness during cross-examination through use of that witness' prior invocation of his fifth amendment privilege does not rise to a constitutional level even if harm results, because the harm involves another's exercise of a constitutional privilege rather than a constitutional privilege of the defendant. *United States* v. *Rubin*, 559 F.2d 975, 984 (5th Cir. 1977), vacated, 439 U.S. 810, 99 S. Ct. 67, 58 L. Ed. 2d 102 (1978), rev'd in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864, 100 S. Ct. 133, 62 L. Ed. 2d 87 (1979); *People* v. *Godsey*, 74 Ill. 2d 64, 73, 383 N.E.2d 988 (1978); see *United States* v. *Natale*, 526 F.2d 1160, 1171 (2d Cir. 1975), cert. denied, 425 U.S. 950, 96 S. Ct. 1724, 48 L. Ed. 2d 193 (1976). Thus, these two claims of alleged prosecutorial misconduct are claims of evidentiary error reviewable under the standard of harmless error applicable to nonconstitutional errors. *State* v. *Burak*, 201 Conn. 517, 527, 518 A.2d 639 (1986); *State* v. *Vitale*, supra, 403.

The state concedes that requiring Mercier to invoke his fifth amendment privilege against self-incrimination in the presence of the jury and later attempting to impeach the witness with his prior assertion of the privilege constituted error. " ' "When a trial error in a criminal case does not involve a constitutional violation the burden is on the defendant to demonstrate the harmfulness of the court's error. *State* v. *Ruth*, 181 Conn. 187, 196–97, 435 A.2d 3 (1980). The defendant must show that it is more probable than not that the erroneous action of the court affected the result. Id.; *State* v. *McClain*, 171 Conn. 293, 300, 370 A.2d 928 (1976)." *State* v. *Jones*, 205 Conn. 723, 732, 535 A.2d 808 (1988).' *State* v. *Vilalastra*, [supra, 47]." *State* v. *Sierra*, 213 Conn. 422, 436–37, 568 A.2d 448 (1990). We conclude that the defendant has not met his burden.

Requiring a witness to assert the fifth amendment privilege against self-incrimination in the presence of

the jury presents two potential grounds for a finding of harmful error. " 'First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick*, 197 Conn. 115, 126, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986), quoting *Namet* v. *United States*, supra, 186–87.

Although the state's repeated questioning of Mercier with the design to elicit an invocation of the fifth amendment privilege in the presence of the jury was highly inappropriate as it served no legitimate purpose, such action did not constitute prosecutorial misconduct within the meaning of *Namet* v. *United States*. The record indicates that the state had prior knowledge that Mercier would invoke the privilege. Knowledge alone, however, does not substantiate the defendant's claim that the state consciously sought to build its entire case through use of Mercier's invocation by undermining the credibility of all defense witnesses. The state had made its objective clear when it requested that Mercier answer its question regarding marihuana use.[4] It sought to raise doubt as to Mercier's ability to observe and perceive events, an entirely permissible subject of cross-examination. *State* v. *Esposito*, 192 Conn. 166,

[4] Regarding its questions on marihuana use, the state claimed: "It's highly relevant. I claim that as highly relevant. He has testified as far as perceptions of what he observed, what he heard, what he saw, his observations. And, my point here is that he was not in complete control of his faculties, and I ask this question based on good faith, Your Honor. I do not ask it frivolously."

176, 471 A.2d 949 (1984), cert. denied sub nom. *Pierson* v. *Connecticut*, U.S. , 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989); *State* v. *Ramirez*, 16 Conn. App. 284, 291, 547 A.2d 559, cert. denied, 209 Conn. 828, 552 A.2d 434 (1988). Absent any further showing by the defendant, therefore, we cannot conclude that the state made "a conscious and flagrant attempt to build its case out of inferences arising from [Mercier's] use of the testimonial privilege." *Namet* v. *United States*, supra, 186.

"Nor is this a case where a witness' invocation of the fifth amendment lent critical weight to the state's case, as where the prosecutor uses the assertion of the privilege by an accomplice or someone linked to the defendant's crimes in order to build a case against the defendant." *State* v. *Reddick*, supra, 127; see also *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959) (two of the witnesses who invoked their fifth amendment privilege were critical witnesses in the sense that their silence acted as the sole source of potential corroboration for the state's version of the crime). Mercier was not a key witness in this regard or as a result of any special relationship with the defendant. Compare *State* v. *Williams*, 204 Conn. 523, 535, 529 A.2d 653 (1987) (record supported claim of serious prosecutorial misconduct where alleged improper conduct involved cross-examination of the defendant's principal witness, his wife); *People* v. *Godsey*, supra, 75 (reversible error where prosecutor referred to prior fifth amendment invocation of the defendant's wife).

The defendant contends that Mercier's assertion of his fifth amendment privilege added critical weight to the state's case, because through Mercier's silence the state intended to create the overall impression of a depraved, licentious environment at the defendant's apartment that would lead the jury to infer that the defendant was guilty of the crimes charged. Such an

inference of guilt is not reasonable in this case, however, because the specifications of the charges against the defendant were exclusively acts of a sexual nature. There were no allegations regarding a depraved or immoral environment and drug use was not at issue. Compare *People* v. *Godsey,* supra (likelihood that inference of witness' guilt transferred to defendant, because fifth amendment plea directed toward the same criminal involvement as that for which defendant was on trial). Without any logical nexus between the charges pending against the defendant and the subject matter about which Mercier was questioned, there was no reasonable basis from which the jury could draw an inference of the defendant's guilt. The defendant's claim of critical weight, therefore, fails in this respect as well.

Whether examination of a witness regarding his prior fifth amendment invocation for the purpose of impeachment requires reversal due to its prejudicial impact on the outcome of the trial involves the consideration of various factors, including: (1) the remoteness of the witness' testimony from the crime with which the defendant is charged; (2) the likelihood of juror confusion whereby the defendant is subconsciously linked to the witness' assertion of the privilege; and (3) the cumulative nature of the evidence, if any, provided by the witness. See *United States* v. *Rubin,* supra, 986–88; *United States* v. *Natale,* supra, 1171.

In this case, the substance of Mercier's testimony was remote from the central issue of the case, namely whether the sexual assaults had in fact occurred in the bedroom of the defendant's apartment as alleged by the victim. Whereas the victim provided direct evidence regarding the incidents in question, Mercier's testimony only provided circumstantial exculpatory evidence in that he stated that he had never observed any unusual behavior between the defendant and the victim and that in his opinion the defendant was a good father. Thus,

the jury could reasonably have believed the testimony of both Mercier and the victim and still have found the defendant guilty. Compare *United States* v. *Tomaiolo*, 249 F.2d 683 (2d Cir. 1957) (reversible error where state sought to impeach witness with prior fifth amendment assertion in response to questions regarding specific offense with which defendant was charged).

It is highly unlikely that the jury was confused by the recross-examination regarding Mercier's prior invocation of the fifth amendment to such an extent that it subconsciously linked the defendant to Mercier's assertion of the fifth amendment privilege. First, it was evident from the state's questions, which focused on perception, that the state was trying to impeach Mercier's credibility rather than trying to create an inference as to the defendant's guilt. Second, Mercier arguably dispelled any adverse inference that might have been drawn by his prior silence by proceeding to testify that he had not smoked marihuana at the defendant's apartment while the victim was present. Finally, Mercier responded to the state's questions regarding inconsistency by explaining that his assertion of the fifth amendment resulted from his lack of understanding and therefore was not inconsistent with his present testimony. Combined with the lack of any connection between marihuana use and the charges against the defendant, Mercier's rehabilitation made it unlikely that any reasonable juror would be confused and as a result subconsciously link the defendant to Mercier's invocation of the privilege.

Since other defense witnesses presented testimony similar to Mercier's regarding their observations and impressions of the defendant and the victim, Mercier's testimony was cumulative. The defendant claims that the impeachment served to discredit all of the witnesses who presented the same or similar evidence thereby unduly prejudicing the defendant. As previously stated,

this argument fails, because the state did not imply that the prior invocation was relevant to any witness' credibility except that of Mercier.

On the basis of the foregoing, we cannot conclude that the evidentiary rulings of which the defendant complains had a prejudicial impact on the outcome of the trial. *State* v. *Vilalastra,* supra; *State* v. *Jones,* supra.

II

The defendant also challenges the state's comments during summation regarding the credibility of Mercier as a defense witness. During final argument, the state attacked Mercier's credibility by contrasting Mercier's initial invocation of his fifth amendment privilege in response to questions concerning marihuana use with his subsequent waiver and denial of marihuana use.[5]

Unlike the aforementioned claims of prosecutorial misconduct, this claim was not preserved at trial. The failure to raise distinctly at trial the matter being objected to ordinarily renders a claim unreviewable on appeal. Practice Book § 4185.[6] The defendant, however,

[5] During its summation the state argued: "The defendant's best friend, Dean Mercier, a man who was at the defendant's apartment, according to him, ninety percent of the time on the weekends, left this courtroom with no credibility whatsoever. First he claims his fifth amendment right not to incriminate himself in response to a line of questioning about his mental [state] and his level of sobriety or lack thereof when he was at that apartment, then, he comes back in and wants to answer the questions in a different way. If he was really being straightforward with us, members of the jury, why didn't he answer the question the first time? Because he is not being straightforward. He is playing games with this Court. He only wants to help his best friend. He has no credibility. What he saw or did not see at that Danbury apartment is as elusive as a puff of smoke."

[6] Practice Book § 4185 provides in pertinent part: "The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court."

urges this court to review his claim as plain error under § 4185.[7] " 'Such review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.' *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985)." *State* v. *Johnson*, 214 Conn. 161, 171, 571 A.2d 79 (1990). While the summation remarks were highly inappropriate,[8] under the facts here presented we cannot say that in the context of the entire trial the summation remarks "constituted a manifest injustice to the defendant so as to impair the effectiveness or integrity of his trial." Id.; *State* v. *Hinckley*, supra, 88. Accordingly, there is no plain error in this case.

In evaluating the reasons set forth above, we note that the cumulative effect of the contested rulings was not so prejudicial as to have affected the outcome of the trial. Even if we were to consider the defendant's unpreserved claim in assessing the overall effect, our conclusion would be the same.

Accordingly, we affirm the judgment of the Appellate Court.

In this opinion the other justices concurred.

[7] Although the defendant refers to this claim in constitutional terms, at oral argument he clearly stated that his claim of reviewability was premised on the plain error doctrine. Therefore, we see no need to address its reviewability under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), and *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973).

[8] "The prosecutor may not express his own opinion, either directly or indirectly, as to the credibility of witnesses. *United States* v. *Modica*, [663 F.2d 1173, 1181 (2d Cir. 1981) cert. denied, 456 U.S. 989, 102 S. Ct. 2269, 73 L. Ed. 2d 1284 (1982)]; *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973); *State* v. *Floyd*, 10 Conn. App. 361, 365, 523 A.2d 1323 [cert. denied, 203 Conn. 809, 525 A.2d 523, cert. denied, 484 U.S. 859, 108 S. Ct. 172, 98 L. Ed. 2d 126] (1987); ABA Standards for Criminal Justice (Second), The Prosecution Function § 3-5.8 (b) (1985) . . . ." *State* v. *Williams*, 204 Conn. 523, 541, 529 A.2d 653 (1987).

APPENDIX D

Opinion of the Connecticut Appellate Court

STATE OF CONNECTICUT v. ERIC N. PERSON
(6774)

SPALLONE, DALY and FOTI, Js.

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child in connection with incidents involving his daughter, the defendant appealed to this court claiming, inter alia, that the trial court erred in permitting a key defense witness to assert his fifth amendment privilege in the presence of the jury when he was asked by the prosecutor whether he had smoked marihuana in the defendant's apartment. *Held:*

1. The defendant was not unfairly prejudiced by the challenged ruling, there having been no prosecutorial misconduct and any inferences that could have been drawn by the jury from the invocation of the privilege not having added critical weight to the state's case; furthermore, although the prosecutor should not have been permitted to argue that the invocation of the privilege was inconsistent with the witness' subsequent testimony that he had not smoked marihuana, that error was harmless.
2. The trial court did not abuse its discretion in refusing to permit the defendant to introduce testimony of a psychiatrist and a psychologist to the effect that he did not fit the profile of a pedophile; the defendant did not elicit testimony from either witness that the profile that was to be the subject of testimony was accepted by the scientific community, nor did he establish that the witnesses had expertise in areas related to intrafamily sexual abuse.
3. The trial court did not abuse its discretion in excluding, on relevancy grounds, evidence that the victim's best friend had accused her own father of sexual assault; that court reasonably could have concluded that the basis for the questions the defendant sought to ask was mere speculation and that that inquiry was unjustified.
4. The defendant's challenge to the admission of an audiotaped interview of the victim was not adequately briefed and was deemed abandoned.
5. The defendant's claims that the trial court erred in permitting one police detective to comment on the victim's credibility and another to testify regarding patterns of conduct of child molesters were not distinctly raised at trial and were not entitled to plain error review.
6. The trial court did not abuse its discretion in denying the defendant's motions for a mistrial following questions by the prosecution concerning possible marihuana use in the defendant's apartment; even if the questions were improper, the fact that they were asked was not enough to deny the defendant a fair trial, particularly as the court gave an appropriate cautionary instruction.
7. The defendant's claim that the trial court erred in admitting testimony that the defendant's sister had asked one of his daughters not to testify was not adequately briefed, and even if that ruling was erroneous,

any error was harmless; moreover, there was no merit to the defendant's claim that he was deprived of a fair trial by that court's warning the sister, in the presence of the jury of her right against self-incrimination.

Argued June 22—decision released September 26, 1989

Information charging the defendant with the crimes of sexual assault in the fourth degree and sexual assault in the second degree and with two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Geen, J.*; verdict and judgment of guilty of sexual assault in the second degree and of one count of risk of injury to a child, from which the defendant appealed to this court. *No error.*

F. Mac Buckley, with whom, on the brief, was *Hubert J. Santos,* for the appellant (defendant).

Harry Weller, deputy assistant state's attorney, with whom, on the brief, were *Walter Flannigan,* state's attorney and *Mary Elizabeth Barran,* assistant state's attorney, for the appellee (state).

SPALLONE, J. The defendant appeals from the judgment of conviction, rendered after a jury trial, of the crimes of risk of injury to a child, General Statutes § 53-21,[1] and sexual assault in the second degree, General Statutes § 53a-71 (a) (1).[2] The defendant claims

[1] [General Statutes] Sec. 53-21. INJURY OF RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[2] General Statutes § 53a-71 provides, in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age . . . ."

that the trial court erred (1) in permitting a key defense witness to assert his fifth amendment privilege in the presence of the jury, (2) in prohibiting the defendant from calling certain expert witnesses, (3) in prohibiting the defendant from questioning the victim's best friend concerning the friend's complaint of sexual assault against her father, (4) in admitting as a state's exhibit an audiotaped interview given by the victim, (5) in permitting two police detectives to give opinions concerning the victim's credibility and "common pattern" evidence in child abuse cases, (6) in not declaring a mistrial after the prosecutor questioned a defense witness regarding his use of marihuana at the defendant's apartment, and (7) in permitting hearsay testimony that the defendant's sister had asked one of the victims not to testify and then warning the defendant's sister, in the presence of the jury, of her right against self-incrimination.

The defendant was arrested and charged with one count of sexual assault in the fourth degree; General Statutes § 53a-73a (a) (1) (D); and one count of risk of injury to a child; General Statutes § 53-21; in connection with certain sexual acts allegedly perpetrated against his older daughter. He was tried to a jury on these charges, along with the charges of risk of injury to a child and sexual assault in the second degree related to offenses involving his younger daughter, age eight at the time of the trial.[3] He was acquitted of the crimes involving the older daughter, but was convicted of the two counts involving his younger daughter (the victim).

The defendant and the victim's mother were divorced in June, 1981. Subsequent to the divorce, the victim visited the defendant on weekends at his apartment in

[3] The defendant's younger daughter was eight years old at the time of the trial in 1987. The events complained of occurred sometime between September 1, 1984 and January 31, 1987.

Danbury. At trial, the victim stated that during these visits the defendant would take her into his bedroom and engage in a number of sexual acts with her. The victim described these acts very specifically, in graphic detail. Moreover, the victim used anatomically correct dolls to describe the defendant's sexually abusive behavior.

The victim's doctor provided constancy of accusation testimony, stating that there was physical evidence of the victim's molestation. Other constancy of accusation testimony was provided by the victim's mother and two police officers who had investigated the matter. Following his conviction of the crimes of risk of injury to a child and sexual assault in the second degree, the defendant filed this appeal.

The defendant's first claim of error is that the trial court erred in permitting a key defense witness to assert a fifth amendment privilege in the presence of the jury. The following facts are relevant. Following the defendant's testimony, he called his friend, Dean Mercier, to testify for the defense. Mercier testified that he had been a frequent visitor at the defendant's apartment during the period of time the alleged assaults on the victim occurred and that nothing unusual had transpired while he was at the apartment. On cross-examination, in response to the state's question regarding how well he was able to perceive events during his visits to the apartment, Mercier stated that his perception was very sharp. The state then inquired whether it was true that, during such visits, Mercier frequently smoked marihuana. The defendant objected to this question, and the court excused the jury. In argument to the court, the state claimed that its inquiry into Mercier's use of marihuana was proper because a positive answer would call into question his ability to perceive events properly. The defendant argued that the introduction of this issue into the case was inflamma-

tory and moved for a mistrial. The court denied the defendant's motion for a mistrial. The court indicated that, although the question would have been improper if asked of the defendant, it was permissible for the state to question a defense witness regarding his ability to perceive. Mercier, apparently concerned that an answer to the question might incriminate him, asked for the opportunity to consult with an attorney. He left the witness stand, and, upon returning later, agreed to answer the state's questions, despite the fact that he had been unable in the interim to contact his attorney. The trial court advised Mercier against testifying under the circumstances, however, and Mercier was excused for the day.

When Mercier was recalled for cross-examination, he informed the court that he would not answer any questions about marihuana use. Defense counsel argued that Mercier's invocation of his fifth amendment privilege should occur outside the presence of the jury. The trial court denied the defendant's request, and the defendant excepted. In the jury's presence, the state asked Mercier eight questions regarding his use of marihuana.[4] In response to each question, Mercier asserted his fifth amendment privilege against self-incrimination.

The following day, the defendant recalled Mercier, and at that time Mercier waived his fifth amendment

[4] The questions the prosecutor asked Mercier were as follows: (1) Whether he frequently smoked marihuana while at the defendant's apartment; (2) how often he smoked when the defendant's children were present; (3) how much marihuana he smoked in general; (4) whether it was true he smoked marihuana in the presence of the defendant's children on a regular basis; (5) with whom he smoked marihuana at the defendant's apartment; (6) whether he "got high" when he smoked marihuana when the children were there; (7) whether, when he "got high" when he smoked marihuana in the children's presence, his ability to perceive events happening around him was affected; (8) whether he smoked marihuana with the defendant's oldest son.

privilege and testified that he had never smoked marihuana in the defendant's apartment when the victim was present. Upon recross-examination, the state asked several questions designed to show that Mercier's present denial of marihuana use was inconsistent with his previous assertion of his privilege against self-incrimination. During final argument, the state argued that Mercier was not credible because he had first asserted his privilege against self-incrimination and later waived that privilege, denying any involvement in any illegality.

We note at the outset that the defendant's first claim does *not* present any constitutional issues. The defendant claims no violation of his own constitutional rights, and he has no standing to assert the constitutional rights of the witness. See *State* v. *Williams,* 206 Conn. 203, 208, 536 A.2d 583 (1988); *State* v. *Jones,* 205 Conn. 723, 739, 535 A.2d 808 (1988). In essence, therefore, he presents a claim of evidentiary trial error.

The defendant claims that the circumstances in this case present the type of situation that warrants reversal of his conviction and a new trial under the theories discussed in *Namet* v. *United States,* 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Our Supreme Court discussed *Namet* v. *United States,* supra, in *State* v. *Reddick,* 197 Conn. 115, 126, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986). "In *Namet* v. *United States* [supra], the United States Supreme Court addressed the issue of when a witness' claim of his privilege not to answer results in reversible error. The court outlined two aspects of the issue, each suggesting a distinct ground of error. 'First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second

theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick,* supra. The defendant bases his claim of error on both theories, arguing that the prosecutor deliberately utilized the fact that Mercier had asserted his privilege against self-incrimination as a trial tactic to create "the overall implication of depravity and licentiousness in the defendant's household" and to prejudice the defendant unfairly. We find the defendant's claim unpersuasive and reject his assertion that a new trial is necessary.

First, this case does not present the scenario of prosecutorial misconduct contemplated by *Namet* v. *United States,* supra. This is not a situation in which the prosecutor deliberately called to the stand a witness whom she knew intended validly to invoke the privilege against self-incrimination. See id., 185–86; *United States* v. *Maloney,* 262 F.2d 535 (2d Cir. 1959). Rather, in this case the witness was called by the defense, and the witness' assertion of the privilege occurred in the context of cross-examination by the prosecutor. Nor should the prosecution's conduct be characterized as "deliberate attempts by the Government to make capital out of [the witness'] refusals to testify." *Namet* v. *United States,* supra, 189. The prosecutor's initial purpose in questioning Mercier regarding his use of marihuana was to impeach his credibility by casting doubt on his ability to perceive and recall the events that were the subject of his testimony. The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. *State* v. *Esposito,* 192 Conn. 166, 176, 471 A.2d 949 (1984). Consumption of alcohol or drugs obviously can impair an individual's ability to observe and recall accurately

and so is a proper subject of inquiry on cross-examination. *State* v. *Heinz*, 3 Conn. App. 80, 86, 485 A.2d 1321 (1984). At the outset, then, the prosecutor's questioning of Mercier was proper. There is no support for the defendant's claim of prosecutorial misconduct.

Moreover, this is not a case in which " 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick*, supra, 126, quoting *Namet* v. *United States*, supra, 187. This is not a case, for instance, in which the prosecutor used the assertion of the privilege by an accomplice or someone linked to the defendant's crimes in order to build a case against the defendant. See *State* v. *Reddick*, supra, 127. Again, the prosecutor was merely cross-examining Mercier in an attempt to impeach his credibility. Mercier's assertion of the privilege cannot be seen as having formed the bases for inferences adding "critical weight" to the prosecutor's case. Although his refusal to answer questions concerning his use of marihuana could conceivably have caused the jury to draw an impermissible inference that he was asserting the privilege in order to hide the fact that he used marihuana; see *State* v. *Daley*, 11 Conn. App. 185, 188, 526 A.2d 14 (1987); the jury's drawing that inference would not have given critical weight to the prosecution's case. It would merely have resulted in the discrediting of a defense witness. Even if the possibility that the jury drew an impermissible inference from the fact of Mercier's assertion of the privilege could be seen as being of critical weight, any prejudice to the defendant caused thereby was defused by Mercier's subsequent testimony denying the use of marihuana. That testimony presumably settled whatever questions might have been raised in the minds of the jurors regarding his reasons for asserting the privilege. In any event, "no prejudice will generally be

presumed to flow from the refusal of a witness to answer questions concerning acts committed by him unrelated to the defendant's alleged crime . . . ." *People* v. *Jones*, 138 App. Div. 2d 405, 406, 525 N.Y.S. 2d 689 (1988). We therefore conclude that the defendant in this case was not unfairly prejudiced by a likelihood that inferences from Mercier's assertion of a fifth amendment privilege added critical weight to the prosecution's case in a form not subject to cross-examination.

The state acknowledges, however, and we agree, that it was improper for the trial court to permit recross-examination for the purpose of establishing inconsistency between the implications of Mercier's assertion of the privilege against self-incrimination and his subsequent testimony that he had not used marihuana in the defendant's apartment. The refusal of a witness to testify, on the ground that it would incriminate him, cannot be the basis of any inference, either favorable to the prosecution or favorable to the defendant. *State* v. *Daley*, supra. Therefore, no inconsistency could be shown between Mercier's refusal to testify and his later statement that he had not used marihuana in the defendant's apartment. We conclude, however, that the error was harmless.

In his second claim, the defendant argues that it was error for the trial court to prohibit him from establishing, through the testimony of a psychiatrist and a psychologist, that the defendant did not fit the profile of a pedophile.

The trial court has wide discretion in ruling on the admissibility of expert testimony. *State* v. *Kemp*, 199 Conn. 473, 476, 507 A.2d 1387 (1986). In reviewing the trial court's decision, we do not decide whether this or any other court would have reached the same conclusion. *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 311–12, 521 A.2d 1017 (1987). Absent a manifest

abuse of discretion, the trial court's decision will stand. *State* v. *Spigarolo,* 210 Conn. 359, 376, 556 A.2d 112 (1989); *State* v. *Hasan,* 205 Conn. 485, 488, 534 A.2d 877 (1987). We agree with the state that the trial court did not abuse its discretion when it rejected the defendant's proffer of expert testimony on whether the defendant fit the profile of a pedophile.

A majority of the courts that have considered the issue have rebuffed attempts on the part of the state as well as the defendant to present testimony of this kind. See, e.g., *Douglas* v. *United States,* 386 A.2d 289 (D.C. App. 1978) (evidence that defendant fit into statistical category of abuser extremely prejudicial); *Sanders* v. *State,* 251 Ga. 70, 303 S.E.2d 13 (1983); *State* v. *Loebach,* 310 N.W.2d 58 (Minn. 1981) (error to admit profile of battering parents); *State* v. *Claflin,* 38 Wash. App. 847, 690 P.2d 1186 (1984); *State* v. *Steward,* 34 Wash. App. 221, 660 P.2d 278 (1983). In *Douglas* v. *United States,* supra, 296, the court noted that the defendant, through expert testimony, was attempting to prove "that the absence of articulated or observable sexual abnormalities established the fact that he did *not* commit the particular offense with which he had been charged." The court stated, "[w]e do not regard the field of psychology as being so exact . . . as to be able to determine with sufficient reliability that an individual did *not* commit a certain act, based solely on the presence of some characteristics and the absence of certain observable symptoms." (Emphasis in original.) Id. We agree that psychiatric evidence regarding the propensity or lack of propensity of a defendant to commit a crime should not be allowed. See C. Tait & J. LaPlante, Handbook of Connecticut Evidence (2d Ed.) § 7.16.3 (i). When scientific expertise is offered in an area outside the general knowledge of the average juror, the subject matter of such testimony must be sufficiently established to have gained general acceptance

in the particular field. *Frye* v. *United States*, 293 F. 1013, 1014 (D.C. App. 1923). " 'Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *State* v. *Hasan*, supra, 489, quoting *Frye* v. *United States*, supra; see also *State* v. *Spigarolo*, supra. The defendant failed to elicit testimony from either expert that the profile that was to be the subject of his testimony was accepted by the scientific community.

Moreover, the trial court was justified in excluding the expert testimony offered by the defendant because the defendant failed to demonstrate that the witnesses had a special skill or knowledge directly applicable to a matter at issue that would make their testimony informative and helpful to the jury. "Expert testimony is admissible if the witness possesses a special skill or knowledge directly applicable to a matter in issue, the skill or knowledge is not commonly shared by the average person, and the testimony would be helpful to the court or jury in considering the issues . . . . " *State* v. *Hasan*, supra, 488. Although the defendant's experts testified that they were experienced in treating a number of sexual offenders and victims, they did not testify to having had any experience dealing with incestuous relationships such as that presented in this case. At least one modern commentator takes the view that the incest offender's chief aberrancy is incest and that, usually, there is no history of other sexually related problems occurring outside the family. Groff & Hubble, "Incest," 11 Criminal Justice and Behavior,

461, 473 (1984). Incestuous fathers are often excluded from the studies of pedophiles. M. de Chesney, "Father Daughter Incest," 4 Behavioral Sciences and the Law, 382 (1985). Because the defendant never established that his expert witnesses had expertise in areas directly related to intrafamily sexual abuse, the trial court could reasonably have concluded that it was unlikely that their testimony would be of help to the jury.

The defendant's third claim is that the trial court erred in excluding evidence that the victim's best friend had accused her father of conduct similar to the conduct in which the defendant had engaged. The following facts are relevant. The friend was the first person the victim told that she was being sexually abused by her father. The friend reported the conversation to her mother, who, in turn, informed the victim's mother. As a result of a complaint made by the friend, the friend's father had been charged with two counts of risk of injury and two counts of sexual assault in the second degree. To establish this fact and the fact that the victim and her friend had discussed these matters, the defense subpoenaed the friend. The state filed a motion in limine seeking to bar the friend's testimony. The friend's personal counsel moved to quash the subpoena. The defendant argued that the friend's testimony could be vital to the defense and that he wished to question her for the purpose of proving knowledge of sexual activity on the part of the friend and the victim and a motive on the part of the two children against their respective fathers. Counsel wanted to investigate the possibility that the victim had obtained her knowledge of sexual matters from stories told to her by the friend, as well as the possibility that the victim and the friend had either fabricated or fantasized the events described by the victim. The trial court ruled that the defendant could not question the friend regarding the charges against her father, but that the defendant could

question her regarding statements the victim had made to her concerning the activities of the defendant. The court relied, in part, on relevancy grounds.[5]

The trial court has broad discretion in determining the relevancy of proffered evidence. *State* v. *Pollitt,* 205 Conn. 61, 91, 530 A.2d 155 (1987). A ruling excluding evidence as irrelevant will not be disturbed absent a showing of a clear abuse of discretion. *State* v. *Fritz,* 204 Conn. 156, 167–68, 527 A.2d 1157 (1987); *State* v. *Watkins,* 14 Conn. App. 67, 73, 540 A.2d 76, cert. denied, 208 Conn. 804, 545 A.2d 1102(1988). In a determination of whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. *State* v. *DeAngelis,* 200 Conn. 224, 238, 511 A.2d 310 (1986); *State* v. *Escobales,* 16 Conn. App. 272, 277, 547 A.2d 553 (1988).

The defendant urges upon us the proposition that, because the victim and her friend made similar complaints against their fathers, the jury should have been made aware of this fact for the purpose of weighing the credibility of the victim. The defendant's argument

[5] The trial court apparently also based its ruling on General Statutes § 54-86d and § 54-86e, which provide as follows:

"[General Statutes] Sec. 54-86d. DISCLOSURE OF ADDRESS OR TELEPHONE NUMBER BY VICTIMS OF SEXUAL ASSAULT. Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense."

"[General Statutes] Sec. 54-86e. INFORMATION RE NAME AND ADDRESS OF VICTIM OF SEXUAL ASSAULT TO BE CONFIDENTIAL. The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals

rests upon an assumption that the victim's credibility would somehow automatically be placed in question by evidence of the fact that she had a friend who claimed, as did she herself, to have been the victim of sexual abuse. There is no necessary logical link, however, between the fact that the victim had a friend who also claimed to be a victim of sexual abuse and a conclusion that the victim might therefore be an unreliable witness whose testimony regarding the defendant's actions was not worthy of belief. In the absence of evidence tending to show the significance, if any, of the fact that the friend had also claimed to have been sexually abused, that fact indicates nothing about the accuracy and reliability of the victim's testimony regarding the defendant. In the absence of evidence to establish a connection between the friend's personal circumstances and the victim's credibility, the trial court reasonably concluded that the basis for the defendant's questions was mere speculation and that

under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused."

In his reply brief, the defendant argues that "[t]o the extent that the trial court relied upon Conn. Gen. Stat. Sec. 54-86e . . . to rule that [the friend's] testimony was to be excluded . . . it is unconstitutional as a violation of the due process clauses of the Constitution of The United States and the State of Connecticut." The extent of the defendant's briefing of this claim is this declaration in his reply brief followed by a citation to *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). We will not review this claim under these circumstances. In any event, we need not review a constitutional claim where, as here, there is some other ground on which the case may be decided. See *State* v. *Warren*, 14 Conn. App. 688, 699, 544 A.2d 209 (1988).

The record does not indicate whether the defendant argued that his constitutional right to confrontation would be implicated by a decision to exclude the friend's testimony. Nevertheless, on appeal, he declares in his brief that "[t]he trial court's decision to prohibit testimony concerning [the friend's] accusations against her father denied [the] defendant his constitutional right to confrontation." The defendant did not brief this claim and therefore we will not consider it.

further inquiry was therefore unjustified. See *State* v. *Daniels*, 8 Conn. App. 190, 194, 512 A.2d 936 (1986).

The defendant's fourth claim is that the trial court erred both in admitting into evidence, as a state's exhibit, an audiotape recording of an interview with the victim conducted by Detective Daniel Mulvey of the Danbury police department, and in permitting the jury to bring the tape into the jury room to play during its deliberations. The circumstances surrounding admission of the tape were as follows. Mulvey testified that, on February 10, 1987, he conducted an audiotaped interview with the victim during which he took her statement. Mulvey used a question and answer format to obtain the statement. The state offered the tape as an exhibit. The defendant objected on sixth amendment and hearsay grounds. The state argued that the tape was admissible under the constancy of accusation exception to the hearsay rule. The trial court agreed with the state that the tape was admissible to show constancy of accusation, and the tape was admitted as state's exhibit 2 and played to the jury during the trial. The trial court explained to the jury that the tape had been admitted to show constancy of accusation, and it fully explained the constancy of accusation doctrine in its instructions. The jury was permitted to take the tape and a tape recorder into the jury room during deliberations.

We first consider the state's argument that the defendant's claim is not reviewable because the defendant did not object when the court permitted the jurors to take a tape recorder into the jury room so that they would be able to play the tape during deliberations. The state contends that the defendant thus failed to preserve the issue for appellate review. See Practice Book § 4185. We disagree. The defendant's objection to the admissibility of the tape was sufficient to express his objection to its submission to the jury. The purpose of

any evidentiary objection is to prevent the evidence from being considered by the trier of fact. Having objected to the admissibility of the tape, the defendant successfully preserved the issues distinctly raised before the trial court for appellate review. See Practice Book § 4185. He was not required to repeat those objections at the time the jury was given the tape recorder for use during deliberations.

Although we have found that the defendant took the necessary steps in the trial court to preserve for appellate review the issue of whether the trial court erred in admitting the tape under the constancy of accusation exception to the hearsay rule, we nevertheless decline to review his claim because he has failed adequately to brief the issue.[6] Under such circumstances, we consider the claim abandoned and decline to review it. See *State* v. *Fiocchi*, 17 Conn. App. 326, 327 n.3, 553 A.2d 181, cert. denied, 210 Conn. 812, 556 A.2d 611 (1989). Similarly, although the defendant objected in the trial court to admission of the tape on the ground of denial of his sixth amendment right to confrontation, and now repeats that claim on appeal, he has failed to discuss the issue in his briefs to this court.[7] We therefore decline to review this claim as well.

[6] The defendant does declare in his brief that the constancy of accusation rule "does not permit the admission of prior written, oral or videotaped statements of the victim. It simply permits the witness, in this case Detective Mulvey, to repeat what the victim told him, as long as the victim has so testified about the matter on direct examination." Then, in his reply brief, the defendant states, "[w]hile the taped interview was allowed under the constancy of accusation exception to the hearsay rule, that exception could only apply to the complainant's prior statement, not the statements of Detective Mulvey." These declarations by the defendant represent the only briefing on the issue of whether the trial court erred in admitting the tape under the constancy of accusation exception to the hearsay rule. The defendant has cited no authority in support of these propositions.

[7] The defendant's attempt to brief the issue is limited to a declaration in his reply brief that his "sixth amendment right to confront Detective Mulvey was violated" by the court's decision to allow the jury to bring the tape to the jury room for use during deliberations.

The defendant's fifth claim of error is that the trial court erred in permitting two police detectives to render opinions concerning the victim's credibility and "common pattern" evidence in child abuse cases. Neither his claim that one of the detectives was improperly allowed to comment on the credibility of the victim, nor his claim that the other detective was impermissibly permitted to testify regarding patterns of conduct of child molesters, was raised by him in the trial court. We need not review evidentiary claims that were not distinctly raised in the trial court. See Practice Book § 4185; *State* v. *Rogers*, 199 Conn. 453, 462, 508 A.2d 11 (1986). Moreover, the defendant states no claim for review under *State* v. *Evans*, 165 Conn. 61, 67–69, 327 A.2d 576 (1973), and we see no reason to accord the defendant's claims plain error review. See *State* v. *Smith*, 209 Conn. 423, 426–27, 551 A.2d 742 (1988).

The defendant's sixth claim is that the trial court erred in twice refusing to grant a mistrial following questions by the prosecutor concerning use of marihuana at the defendant's apartment. The prosecutor first raised the question of marihuana use during the victim's testimony. When the victim was asked if the defendant smoked anything around her, she answered that he smoked cigarettes. The victim was then asked whether the defendant ever smoked anything else. The defendant objected, and the jury was excused. The court sustained the objection and gave a cautionary instruction. The defendant moved for a mistrial, and the court denied the motion.

The issue of marihuana use arose again when the defendant called his landlord, Joseph Marzullo, who testified on direct examination that the defendant and the victim had a good relationship. On cross-examination, the prosecutor asked Marzullo if his opinion about the defendant's relationship with the victim would change if he knew that the defendant regularly smoked mari-

huana in front of the children. The defendant objected, and the jury was excused. The court sustained the objection. The defendant moved again for a mistrial, and the court denied the motion.[8]

The general rule in Connecticut is that a mistrial is granted only where it is apparent that as a result of some occurrence during trial a party has been deprived of the opportunity for a fair trial. *State* v. *Hancich,* 200 Conn. 615, 624–25, 513 A.2d 638 (1986); *State* v. *Maldonado,* 193 Conn. 350, 356, 478 A.3d 581 (1984). The trial court enjoys wide discretion in deciding whether a mistrial is warranted, and its decision will be reversed on appeal only if it is established that this discretion has been abused. *State* v. *Hancich,* supra, 625.

The defendant argues that, because drug use is regarded by many persons "in today's environment" as a major threat to society, testimony about marihuana use at the defendant's apartment in the presence of his children was "so obviously prejudicial as to deny the defendant a fair trial." We disagree with the defendant's contention that in the circumstances of this case the trial court should have declared a mistrial. In the first instance, the record fails to support the defendant's contention that there was any "testimony" regarding the use of marihuana. It appears that objections were made and sustained on both occasions that the prosecutor attempted to elicit information in this regard. Even if the questions were improper, as the trial court apparently decided they were, the fact that the questions were asked is not enough to deprive the defendant of a fair trial, particularly where the court gave an appropriate cautionary instruction to the jury.

[8] In his brief, the defendant also points to the prosecutor's attempt to elicit responses regarding the use of marihuana from Dean Mercier. The claim involving Mercier has been sufficiently addressed in our discussion of the defendant's first claim of error. It is unnecessary to repeat that discussion as part of our review of his sixth claim.

We conclude that the trial court did not abuse its discretion in denying the defendant's motions for a mistrial.

The defendant's final claim is that the trial court erred both in admitting hearsay testimony that the defendant's sister had told his older daughter not to testify and then in advising the defendant's sister, in the presence of the jury, of her privilege against self-incrimination.

The state called Jo-Ann Person, the mother of the defendant's older daughter. She testified that the defendant's older daughter had told her that the defendant's sister, Holly Person, had called and asked his older daughter not to testify against the defendant. The defendant objected on the ground that the testimony was hearsay. The trial court admitted the testimony under the constancy of accusation exception to the hearsay rule.

Later in the trial, the defendant's sister was called to testify. The defendant asked her whether she had telephoned Jo-Ann Person in March, 1987, and Holly Person responded that she had done so. The defendant asked her who had answered the telephone. Holly Person answered that the defendant's older daughter had answered. When the defendant asked Holly Person to describe what occurred during the ensuing telephone conversation, the state objected, and the court engaged the witness in the following exchange:

"The Court: I should warn you, since you do not have an attorney present, and I have been informed, I don't know if it's true or not, but we got partially into the—are you under arrest for any criminal charge?

"The Witness: No, I am not.

'The Court: Okay. There was a reference by the police department that they made a referral to another police

department concerning these telephone calls, and I just wish to tell you that you do not need to answer any of these questions on the grounds that it might tend to incriminate you.

"The Witness: Your Honor—

"The Court: Since you don't have an attorney here, I'm obligated, by law, to tell you that.

"The Witness: Thank you, Your Honor. May I answer the question?

"The Court: That's going to be up to you.

"The Witness: I will. May I explain?

"The Court: No, I don't know what the question is, now,—let's get to the question."

Thereafter, the witness answered questions concerning the telephone conversation.

The defendant argues that the court's admission of Jo-Ann Person's testimony regarding what the defendant's older daughter told her was erroneous because the testimony was hearsay. We will not review this claim because the defendant has failed to brief the issue of whether the trial court erred in admitting the testimony under the constancy of accusation exception to the hearsay rule. We note, however, that even if the court's ruling was erroneous, the defendant has failed to demonstrate that such error was harmful. When a claimed error is evidentiary, the defendant bears the burden of establishing its harmfulness. *State* v. *Nelson*, 17 Conn. App. 556, 568, 555 A.2d 426 (1989). In this case, the jury had already heard, from the defendant's older daughter herself, about Holly Person's telephone conversation with her. An erroneous ruling should not be considered reversible error if the evidence admitted thereby has already properly entered the case. Id.

Therefore, even if the trial court erred in admitting Jo-Ann Person's testimony regarding what the defendant's older daughter told her, the record is clear that the error was harmless.

With regard to the court's remarks to Holly Person, the defendant argues that the court erred in questioning her as it did in the presence of the jury "in a manner bearing directly on her credibility." Relying on *State* v. *Echols*, 170 Conn. 11, 14, 364 A.2d 225 (1975), he argues that a judge must refrain from making remarks that are indicative of either favor or condemnation. The defendant contends that the court's remarks deprived him of a fair trial.

The defendant's arguments are without merit. First, on the basis of the evidence presented at the trial, the court simply anticipated the possibility that the witness, who was not represented by counsel, might be entitled to assert her fifth amendment privilege against self-incrimination. The court took reasonable steps to inform the witness of her rights and to give her a meaningful opportunity to exercise them if she chose. We do not think this solicitousness on the part of the court with regard to the witness' constitutional rights caused the witness' credibility to be compromised before the jury. Moreover, the court's action was not, as claimed by the defendant, in any way indicative of condemnation. We fail to see how the court's remarks could possibly have caused the defendant to be deprived of a fair trial.

There is no error.

In this opinion the other judges concurred.

APPENDIX E

Excerpt of Arrest Warrant Application
For John Ardell

Excerpt of Arrest Warrant Application
Dated February 24, 1987

NAME AND RESIDENCE (Town) OF ACCUSED
John Ardell, 68 Sport Hill Road, Easton, CT

AFFIDAVIT

That I, the undersigned, Police Officer Elizabeth A. Briggs, #10, a regular member of the Easton Police Department for the past 2 1/2 years do hereby make the following affidavit:

That the following set of facts and circumstances are stated from personal knowledge, observation and investigation as well as from information received from brother officers acting in their official capacity.

That I, the undersigned, hold in my possession a Report of Suspected Child Abuse/Neglect (Form CYS-136) as filed by Dr. Judith Hochstadt of 1172 Post Road, Fairfield, Ct. on one Lauren Ardell (DOB: 11/12/79) of 122 Eleanor Terrace, Fairfield, CT.. Report states that Lauren Ardell reported to her mother Julia Rose of 112 Eleanor Terrace, Fairfield, Ct. (DOB: 11/02/47) that Lauren's father, John Ardell, sexually abused her by asking her to "suck his penis".

That I, the undersigned, hold in my possession a CYS 737 report as submitted by Social Worker, Susie Laffitte of the Department of Children and Youth Services, 1115 Main Street, Bridgeport, Ct. detailing report of Dr. Hochstadt that Lauren goes with her father on weekends and week days (no set schedule) and he has forced her to perform oral sex on him and he puts his penis near her vagina but never in her. Susie Laffitte of DCYS spoke with the office of Dr. Hochstadt and reported the incident to this department. (John Ardell, 68 Sport Hill Road, Easton, CT., DOB: 5/7/47)

That I, the undersigned, during my initial investigation and continued investigation have determined that Lauren visited he father on weekends and week days (no set schedule for visitation) and that also during these visits from November 1985 to December 1986 abuses took place.

That on February 5, 1987, at approximately 2000 hours, Mrs. Judith Rose and her daughter, Lauren Ardell, personally appeared at the Easton Police Department. I hold in my possession a sworn written statement submitted by Mrs. Judith Rose that on February 3, 1987, at approximately 1900 hours, her daughter, Lauren Ardell was talking to her about a school friend that was being sexually abused by her father at which time Lauren became hysterical and told Mrs. Rose that it was happening to her also. As this time Lauren told her mother that in the past she had "sucked her father's-

penis". Mrs. Rose was unsure as to how to handle the situation and did not press Lauren for any more details. Mrs. Rose then called her ex-husband and Lauren's father, John Ardell, who was in Nantucket at the time and told him what Lauren had said. Mr. Ardell denied the incident and told Mrs. Rose that Lauren was a "Lolita" who had "come on" to him. Mr. Ardell stated to Mrs. Rose that Lauren was the one with the sexual problems not him. Mrs. Rose continued that on February 4, 1987 she took Lauren to Dr. Hochstadt where she was examined by the doctor and the reports were filed. Mrs. Rose also added that one of the reasons she and John Ardell were divorced was because she and he had sexual problems.

That, after speaking to Mrs. Rose, the undersigned did speak to Lauren Ardell alone. Lauren is a seven year old, who appears to be confident in what she says and articulates he thoughts well. Through the use of questions, visual aids and anatomically correct drawings the undersigned was able to determine what had happened to Lauren. Lauren said that starting in 1985, approximately November, her father, John Ardell had started to ask her to suck his penis. Lauren stated that she did not know what this meant and that he had pointed to the area of his groin. Lauren did not feel that this was right and did not want to do it. Lauren stated that when she saw her father at his house in Easton he kept asking her to suck his penis. Lauren stated that in the beginning of 1986 she did put her father's penis in her

mouth in the hopes that he would stop asking. Lauren stated that she did not like it and pretended to have to go to the bathroom in order to stop. Lauren did point out int drawings a penis, and she did know what the word "suck" meant. Lauren was also able to describe an erection, stating that at first the penis was soft and small in her mouth that it began to get harder and that her father had said it was her fault. Lauren was worried about this. Lauren said that her father kept on asking her to suck his penis, but that she hadn't since the first occurrence.

That on Monday, February 9, 1987 the undersigned did receive a phone call from Mrs. Rose. Mrs. Rose. said that Lauren had become very upset that day and told Mrs. Rose that she hadn't told the undersigned of Dr. Hochstadt the whole truth and that some more incidents of abuse had happened to her.

That on Wednesday, 11, 1987 Mrs Julia Rose and Lauren Ardell returned to Easton Police Headquarters. Mrs. Rose submitted a sworn written statement that on February 9, 1987 Lauren told her that she had her father's penis in her mouth more than once and that he had his penis in her vagina. Mrs. Rose took Lauren back to Dr. Hochstadt and to a psychologist, Dr. Fred Bader. As far as could be determined by the doctor when Lauren said that the penis had been in her vagina it was between her legs. The doctor did not find any evidence of penetration. Mrs. Rose also recalled an

incident where John Ardell had told her that Lauren had pulled down her pants 'bent over' and told Mr. Ardell 'suck my ass'.

That, after speaking to Mrs. Rose, the undersigned then spoke to Lauren Ardell alone. I first asked Lauren why she had not told me everything the first time. Lauren stated that she did not want me to think that she was a bad girl and she was afraid to tell. Again I used visual aids and drawings to help Lauren tell her story. Lauren told me that she had 'sucked' her father's penis on several occasions not just once. Lauren described how her father would lie down on the bed or on the couch in the living room, (Lauren told the undersigned that she had been in the bedroom a lot with her father), and that she would kneel along side of him and suck his penis. Lauren did not have any concept of ejaculation. Lauren also went on to describe how she would lie down on the bed and her father would hold he up slightly while he put his penis between he legs. I asked Lauren if anything else happened. At this point Lauren became quiet and said she was embarrassed. Lauren had trouble talking about this but she stated that on a few occasions her father had taken down her pants, bend her over, and had touched her 'hiney'. Lauren did not know the word anus, but she spoke of her 'rear end'.

That on February 13, 1987, at approximately 2245 hours, the undersigned was able to contact John Ardell and requested him to come to Easton Police

Headquarters, which he did at approximately 2305 hours. Mr. Ardell was told that this department had received complaints of sexual abuse to a Lauren Ardell, and that he was the named abuser. After informing Mr. Ardell of his constitutional rights, Mr. Ardell chose to waive these rights and gave a sworn written statement which I hold in my possession. Mr. Ardell states the following: He denies any implications and indicates that in fact the allegations are erroneous and further describes several episodes of abnormal acts of sexual connotation by his daughter. Mr. Ardell states that he believes this behavior is due to the fact that Lauren was molested by a babysitter in Wayne, New York in approximately 1982 and that another babysitter in Ct was arrested for child molesting on October 1985. Mr. Ardell also stated that on occasions in 1985 the Fairfield Police had been summoned to his ex-wife's (Julia Rose) home in Fairfield, CT on a complaint that the children, Lauren and Brian, were not supervised.

That I, the undersigned, continued my investigation and re-interviewed Julia Rose concerning her ex-husband's John Ardell, statement.

That I, the undersigned, have a sworn written statement of Mrs. Rose who states that Lauren had not been molested in Wayne, New York. At that time Lauren was 3 years old and the babysitter was a 13 year old boy. Both Mr. & Mrs. Rose thought it would be better if the babysitter was a female and the boy was dismissed.

Mrs. Rose further went on concerning the incident in Fairfield, CT.. At the time, 1985, she and her family were living at 312 Riverside Drive in Fairfield, Ct. when the woman who lives downstairs at that address called the police to complain that the Ardell children were not being supervised. Upon investigation the Fairfield Police found a babysitter with the children as well as their father, John Ardell. In regards to the babysitter being arrested, Mrs. Rose stated that she had employed 'Sitting and Home Care Services' to find her a reliable babysitter for the children. A man was sent to Mrs. Rose, he only sat for a short time. This man was later arrested Fairfield Police Department for child molesting. There was no evidence that Lauren or Brian had been molested.

That I, the undersigned, again continued my investigation and contacted the police agencies of Wayne, New York and Fairfield, Ct. Both agencies had not record of the first two preceding incidents. In regards to the babysitter who was arrested in Fairfield the undersigned holds in my possession a report from Fairfield Police Officer VonHoltz that states the babysitter, Brian Bonello, was arrested for assaulting a boy he was sitting for, and that there was no evidence that the Ardell children had been abused by Brian Bonello.

That I, the undersigned, hold in my possession a written statement from the niece of Julia Rose, Susan J. Hamilton, of the Village of Bath, New York, County of

Stuebin, N.Y., which states that from her age of 10 to 16 she was sexually abused by John Ardell.

That I, the undersigned, hold in my possession an investigative report of the Danbury Police Department which describes the meeting of Lauren Ardell and Jamie A. Person corroborating Lauren's reference to the fact that both she and her friend, Jamie, were the victims of sexual abuse by their respective fathers.

That I, the undersigned, Police Officer Elizabeth A. Briggs 10 of the Easton Police Department do hereby request an Arrest Warrant be issued for the arrest of JOHN ARDELL, 68 Sport Hill Road, Easton, Ct. (DOB: 5/7/47) for the charges of:

53a-71 --- Sexual Assault, 2nd
53-21 --- Risk of Injury to a Minor

APPENDIX F

Excerpt of Arrest Warrant Application
For Eric N. Person

Excerpt of Arrest Warrant Application
Dated March 10, 1987

NAME AND RESIDENCE (Town) OF ACCUSED
Eric N. Person . . . . . Danbury

AFFIDAVIT

The undersigned, being duly sworn, deposes and says:

That the affiant, Daniel Mulvey, is presently a member of the Danbury Police Department and has been for a period of service for five years and months. That during said police service the affiant has conducted and participated in numerous investigations into various forms of criminal activity which have resulted in numerous arrests and convictions.

That on February 05, 1987, Detective Russell Benjamin of the Danbury Police Department Youth Bureau received a call from Susie Laffette who is employed as a Social Worker for the Bridgeport, Connecticut office of the Department of Children and Youth Services. That Laffette stated to Detective Benjamin that one Jamie Alexandra Person who was born in Bridgeport, Connecticut on July 27, 1979 had been sexually assaulted by her natural father, identified as one Eric Norman Person who is a Danbury resident, who

according to Department of Motor Vehicle records was born on August 15, 1944.

That the affiant, Daniel Mulvey, interviewed the mother of Jamie Person, identified as Debra Person of 545 Roland Road, Fairfield, Connecticut, at the Danbury Police Department on February 10, 1987 and she reported the following: that at one time she was married to Eric Person and together they had two children identified as Cameron and Jamie Person. That Eric and Debra divorced in June 1981, that Eric has joint custody with liberal and agreeable visitation.

That Debra Person stated to the affiant on February 03, 1987 that she observed her daughter Jamie was upset, that Jamie told her mother that she would be receiving a call from a Judy Rose. That Rose is the mother of sever year old Laurie Ardell, that Ardell is a friend of Jamie Person. That Judy Rose called the Person home and arranged to meet with Debra later that day. Debra stated that Rose came to her home and disclosed to her that Jamie had been molested, sexually, by her father. That Jamie initial disclosed these allegations to Laurie Ardell.

That Debra Person stated to the affiant that she confronted her daughter with these allegations, that Jamie stated in the presence of Rose and Ardell that her father asks her to "lick and suck" his penis, that she had

advised her father that what they had been doing was wrong but that the same behavior continued anyway.

That on February 10, 1987, the affiant interview Jamie Person at the Danbury Police Department. That the affiant along with Danbury Detective Ingrid Yakacki again interviewed Jamie Person at her home, 545 Rowland Road, Fairfield, Connecticut on March 04, 1987. That the affiant found the child to be appropriately intelligent for her age and possessed a good recollection of what had taken place between her father and herself. That Jamie stated that her mother and father divorced and since that time she has usually seen her father, Eric Person, on the weekends, Saturdays and Sundays.

That Jamie Person states to the affiant that behavior of a sexual nature began when she was five years old and remembers being in kindergarten at the time. That these incidents of a sexual nature occurred at her fathers Danbury Apartment, 22 Harrison Street, in the fathers bedroom where she would go to take a nap in the fathers bed. That behavior of a sexual nature continued until her last visit to her fathers apartment, towards the end of January 1987. The victim advised that one incident occurred in her father car.

That Jamie Person stated to the affiant that the molestations began with her father, Eric Person, kissing her on her lips, neck and ears, that this continued for a

while and her father began to kiss Jamies breasts. Jamie stated that during these times in the beginning that she would also kiss her fathers lips, neck and ears.

That Jamie Person stated to the affiant that towards the end of her fifth year the molestations progressed to where her father began to caress and penetrate her vagina with his fingers.

That her father also began to engage in oral sex with her during this approximate time frame. That Jamie stated shortly after the aforementioned behavior began that she engaged in oral sex with her father and also at his request she would fondle his penis. Jamie stated that her actions with her fathers penis would stimulate her father to the point of ejaculation. That Jamie stated on occasion that her father would place his penis on her breasts and would move, rub his penis in little circles to the point of ejaculation.

That Jamie Person stated to the affiant that her father would always put her on his stomach when they were together in bed. That when she was approximately six and half years old that her father would put his penis in between her legs and move up and down, starting slow and progressing faster. That Jamie stated that she would be on top of her fathers stomach when the aforementioned behavior occurred and that she could feel her fathers penis penetrate her vagina, but that she was not sure if she had been fully penetrated by her father.

That Jamie stated that her father, Eric Person, would reach the point of ejaculation, that she would feel "wet" inside her vagina.

That Jamie Person stated to the affiant that one Saturday evening that she was in a car with her father, Eric Person, was operating. That they were going to the Sycamore Restaurant in Bethel, Connecticut to view the old cars at "cruise night". That while in rout there her father exposed his penis and pulled Jamies head down to his penis. That Jamie engaged in oral sex on her father until he ejaculated. Based on the affiants conversation with Jamie I am unable to determine if this incident occurred in the car show season of 1985 or 1986. Jamie Person stated she could not remember the year, but was certain of the night and that the two of them were on their way to view old cars. The car show season at the Sycamore Restaurant usually begins in late April and continues until early September of the year.

That Jamie Person stated to the affiant that she was afraid to tell her mother about what was happening between her father, Eric Person, and herself. Her father told her that by telling about what had or was taking place that he would get in trouble, that Jamie would also get in trouble with her mother, Debra Person. That Jamie stated that she told her father the following:, "I do not think that we should really be doing this:, that Eric Person replied, "neither do I".

That on February 18, 1987 the affiant interviewed Jennifer Person of 26 Mason Street, Fairfield, Connecticut at the Danbury Police Department. That Jennifer Person who was born in Bridgeport, Connecticut on October 01, 1971 stated the following: that her mother, Jo-Ann, was once married to her father, Eric Person, and that they divorced in 1974. That since her parents divorced she has spent time with her father on summer camping trips and at his Danbury Apartment. Jennifer stated that her brother Eric "Rick" Person, age 18, and her half sister Jamie Person and half brother Cameron Person would spent time with her father also at the Danbury Apartment.

That Jennifer Person stated to the affiant that in the summer of 1985 she was on her way back from a summer camping trip with her father and other family members. That her father was operating a vehicle in New York State and Jennifer was sitting in the front seat, passenger side. That Jennifer stated that her father reached over to her and grabbed her left breast. She raised her left arm, pushing it against his right arm. She asked her father what he was doing and Eric Person replied that he was trying to wake her to, to let her know where they were at.

That Jennifer Person stated to the affiant that in the summer of 1986 that she was at her fathers Danbury Apartment, 22 Harrison Street, in the kitchen. That she was standing in front of a kitchen counter top scooping

ice cream when her father brushed up against her and grabbed her buttocks with his hand. That she turned around and told her father to "watch it". He walked away.

That Jennifer Person stated to the affiant that on occasion when she has been at her fathers apartment that she would hear her father, Eric Person, tell Jamie Person to go and take a nap in his room. That Jamie would go into her fathers bedroom and her father would follow in and close the door behind him. That on occasion Jamie would sleep with father overnight while the other children slept in their bedroom or in the living room. That in December 1986 on a saturday at her fathers Danbury Apartment Jennifer had finished cooking dinner and went to her fathers bedroom and walked in on them. That she observed her father & Jamie jump up and pull away from each other. Jennifer told them that dinner was ready. That her father acted as if was surprised and replied, "ok we will be right out right away".

That on February 18, 1987 the affiant interviewed JoAnn Person, mother of Jennifer, of 26 Mason Street, Fairfield, Connecticut at the Danbury Police Department and she stated the following: that she was once married to Eric Norman Person and together they had two children identified as Eric Christian Person and Jennifer Leigh Person. That Eric and JoAnn divorced in 1974, that he had unlimited visitation but did not see his children much until he obtained a divorce from his

second wife, Debra in 1982. That after he second divorce Eric Person saw/had the children from his first marriage usually on weekends, camping trips, and skiing trips.

That JoAnn Person stated to the affiant that in the summer of 1985 Jennifer returned home and told her that Eric Person was operating his car on the ride home when eh reached over and grabbed her, Jennifers, breast. That she was very upset and did not want to see her father anymore. That JoAnn Person stated she called Eric Person on the phone and confronted him with the allegation, that he denied trying to feel Jennifers breasts. That Eric Person stated to JoAnn Person that he was or wanted to see if his daughter was awake or not.

That JoAnn Person stated to the affiant that in the summer of 1986 Jennifer came home from a visit with her father, Eric Person, at his Danbury apartment stating that he had grabbed her buttocks. JoAnn stated that she called Eric on the telephone and confronted him with this allegation and that he denied doing anything that was sexually abusive.

That in February 25, 1987 the affiant interviewed Cameron Person, who was born on November 19, 1975, at his home, 545 Rowland Road, Fairfield, Connecticut. That Cameron stated that his father is Eric Person and his mother is Debra and that they divorced approximately five years ago. That since that time he along with his

sister, Jamie Person, would usually spend weekends with their father, that last approximately four years at his Danbury apartment on Harrison Street. That once in a while his father, Eric, would pick up his half brother and half sister, Eric and Jennifer, and also bring them to the Danbury apartment where they also would spend the weekend.

That Cameron Person stated to the affiant that his sister Jamie Person would take naps in her fathers bedroom but he never gave this a second thought. That one time in the summer of 1986 Cameron stated that his father and Jamie were in his bedroom and that he heard them both laughing and giggling. That on another occasion in the summer of 1986 Cameron stated that he entered his fathers bedroom to get some drawing paper and saw his father and Jamie in the bed together. That Cameron observed Jamie life her head up, that neither of the two said anything, that Cameron got his paper and left the room.

That Cameron stated to the affiant that one occasion, he did not remember the approximate date, that he walked into his fathers bedroom and observed his father laying on his back and that he was not wearing a shirt, etc., and that his sister, Jamie, was laying next to his father rightside. Cameron stated that he observed Jamie wiggling around on the bed next to his father, Eric Person.

That Cameron Person stated to the affiant that around Christmas time, 1986, that his half sister, Jennifer, had come out of his fathers bedroom and stated that "Dad and Jamie were something together". That Jennifer advised Cameron that Eric Person and Jamie acted surprised when she walked into the room.

That Cameron Person stated to the affiant that in all he believes that he walked into his fathers bedroom and saw his father, Eric Person, and sister, Jamie Person, in bed together, approximately four or five times. That last time being around the end of January 1987.

That Cameron Person stated to the affiant that after his mother, Debra, found out about was going on between his father and his sister that Jennifer told him about the incident between his father and her while coming home from a camping trip. That Jennifer stated to Cameron that Eric Person had grabbed her breast.

That on February 25, 1987 the affiant interviewed Julia Rose of 112 Eleanor Terrace, Fairfield, Connecticut at Debra Person's home, 545 Rowland Road, Fairfield, Connecticut. That Julia Rose stated the following: her daughter is Lauren Ardell, that Lauren and Jamie are school mates and friends. That on February 03, 1987, Rose had taken her daughter with her to go shopping, that while in the car Lauren began a conversation with her mother. Rose stated that Lauren asked her what should she do if a friend had told her that her ada was

doing things to her that he should not. Rose stated that her daughter advised her that Jamie Person was the one she was speaking about, that Lauren further stated that Jamie was afraid to tell her mother about this. That Rose stated to the affiant that Lauren and herself went to Debra Person's home and disclosed the above to Debra. (It should be noted that during the initial disclosure on February 03, 1987 that Lauren Ardell also advised her mother, Julia Rose, that she was being sexually molested by her father. That this case, Ardell, was referred to the Easton Police.)

That on February 25, 1987 the affiant interviewed Lauren Ardell at the home of Debra Person. That the affiant found the child to be of appropriate intelligence for her age and possessed a good memory. That Lauren Ardell who was born on November 12, 1979 stated the following: that she is friends with Jamie Person and together they attend the Roger Sherman School. That on February 03, 1987 the two children were in the above schools playground at which time Jamie Person disclosed, to Lauren Ardell, that her father, "Rick", was asking her to "suck his penis". that Jamie further stated that this would take place at her fathers house and in his car. That Lauren advised the affiant the Jamie had told her she was afraid to be with her father and that Jamie was afraid to tell her mother what was going on.

That Lauren Ardell stated to the affiant that she told her mother about the allegations that Jamie Person had

made to her on the dame date. That later on in the evening that her mother, Julia Rose, and herself went to Jamie Persons home and told Debra Person about was said earlier.

That on February 04, 1987 Jamie Person was examined by Doctor Judith Hochstadt of 1172 Post Road, Fairfield, Connecticut. That on medical records of Jamies examination sent to the affiant and on a Department of Children and Youth Services, signed and dated by Doctor Hochstadt, indicated that Jamies hymen was "partially intact". That this form was dated, February 04, 1987.

That on March 09, 1987 the affiant spoke to a woman who identified herself as Doctor Judith Hochstadt, on the telephone. That during this conversation the doctor advised the affiant of the results of her February 04, 1987 exam with Jamie Person. That the Doctor advised the affiant that a "partially intact hymen" is suggestive but not conclusive of vaginal penetration.

APPENDIX G

Transcript of Relevant Portions
of the Prosecutor's Summation
Dated December 8, 1987

EXCERPT OF PROSECUTOR'S SUMMATION, December 8, 1987

****

Ms. BARAN: Members of the jury, the two most important words that can be said to you as you enter your deliberations are "common sense." You must use it and never stray from it. Draw on your own life experiences.

Jamie's testimony was so graphic, her accounting so consistent because those acts had been perpetrated on her body and her mind. Jamie explained that on the weekend, when she would be in her father's Danbury apartment, her father would either take her into the bedroom or come in after her. When she was in Kindergarten in the fall of 1984, she recalls that the sexual contact began with long kisses where he would put his tongue into her mouth.

Now, the sexual activity increased, and Mr. Person would make her have oral contact with his penis. That little girl described the taste of semen. She said it was "gooey," she described its texture, and its consistency. She described how it ran from her throat, and she would try to spit it out.

Members of the jury, no one -- no one especially a little, tiny child, could describe the taste, the texture of semen, what it feels like unless it happened to her. To suggest that a little girl could make up the taste and the

texture and the feel defies reality and common sense. She described how the defendant would make her take his penis in her hand and make her rub it and squeeze it. How his penis felt, she says, "Hard," and how the gooey stuff would come out of it and go onto her hand.

Jamie described how he would put his mouth on her vaginal area and put his tongue inside of her and how she would feel little bumps on his tongue inside of her vagina. She described how he put his tongue and rub his penis on her bottom area where she "goes poo" -- those were her words -- and how sometimes, she would feel wet there when he did that to her.

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ERIC N. PERSON,

Petitioner,

v.

LARRY MEACHUM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. ARE THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS PROCEDURALLY BARRED?

II. DOES THE PETITIONER FAIL TO RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

The respondent State of Connecticut respectfully requests that this Court deny the petitioner for a writ of certiorari seeking review of the summary order in Person v. Meachum, 90-579, Petitioner's Appendix 3A-6A (hereinafter Pet. App.)

JURISDICTION

As is discussed in the argument portions of this brief, infra, the petitioner has failed to demonstrate why his federal claim is not procedurally barred. Thus it is unreviewable under 28 U.S.C. 2254. He also fails to demonstrate that he has raised a substantial federal question in either the state or federal courts. This Court, therefore, is without jurisdiction pursuant to 28 U.S.C. 1254 (1); Supreme Court Rule 10.1(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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54-86d Disclosure of address or telephone number by victims of sexual assault.

Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the

identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense.

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(a) At the time the appellant sends a copy of the endorsed appeal form to the chief clerk of the supreme court, the appellant shall also send the chief clerk an original and one copy of the following:

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Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue. . . .

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Briefs--Appellant's Brief; Contents

The appellant's brief shall contain the following:

(a) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, with appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (d) hereof. The statement ordinarily should not exceed one page in length and should be on a page by itself. The court may refuse to receive a brief not complying with this requirement.

Such statement shall be deemed in replacement of and shall supersede the preliminary statement of issues.

(b) A table of authorities cited in the brief, with references to the page or pages of the brief where the citations to those authorities appear.

OPINIONS BELOW

The summary order of the Second Circuit Court of Appeals appears in the petitioner's appendix at pages 3A-6A. The district court's opinion denying the petition is reported as Person v. Meachum, 772 F. Supp. 69 (D. Conn. 1991). It is reprinted in memorandum form, in Petitioner's Appendix 8A-44A. The Connecticut Appellate Court's ruling on this issue is reported in State v. Person, 20 Conn App. 115, 564 A. 2d 626 (1989) (Person I), and is reprinted in the Petitioner's Appendix 61A-81A.

STATEMENT OF THE CASE

The Connecticut Appellate Court set forth the following history of the petitioner's case:

> The [petitioner] was arrested and charged with one count of sexual assault in the fourth degree; [Connecticut] General Statutes § 53a-73a(a)(1)(D); and one count of risk of injury to a child; [Connecticut] General Statutes § 53-21 in connection with certain sexual acts allegedly perpetrated against his older daughter. He was tried to a jury on these charges, along with the charges of risk of injury to a child and sexual assault in the second degree [Connecticut General Statutes § 53a-71(a)(1)] related to offenses involving his younger daughter, age eight at the time of the trial. He was

acquitted of the crimes involving the older daughter, but was convicted of the two crimes involving the younger daughter[1] (the victim).

The [petitioner] and the victim's mother were divorced in June, 1981. Subsequent to the divorce, the victim visited the [petitioner] on weekends at his apartment in Danbury [CT]. At trial, the victim stated that during these visits the [petitioner] would take her into his bedroom and engage in a number of sexual acts with her.

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[1]. Under Connecticut General Statutes § 54-83e it is improper to divulge the name and address of a sexual assault victim. The petitioner, however, has repeatedly published the names of both victims throughout his petition. Moreover, he has published the name of the witness (LA) whose testimony is at issue in this petition. LA was also the victim of an alleged sexual assault. The respondent requests this Court to seal the petition and honor Connecticut's confidentiality laws which are similar in form and purpose to 18 U.S.C. §3509 (4)(1)-(3). Both, lower courts honored similar requests after petitioner published the victims' names in his filings below. All court's deciding this case have managed to do so without identifying the victim.

> The victim described these acts very specifically, in graphic detail.

State v. Person, Pet. App. 63A-64A (footnotes omitted).

This "graphic detail" included the victim's ability "'to describe a physical ejaculation, the feel of seman [sic], its color, in a way nobody could except if it happened to them.' Tr. (January 26, 1988) at 25." Person v. Meachum, Pet App. at 37A-38A (District Court Opinion quoting the trial court judge).

At trial, the petitioner subpoenaed the victim's best friend LA to testify in his defense. LA had lodged a similar complaint against her father. Person I Pet. App. at 72A. Trial Counsel sought LA's testimony to determine whether the victim gained her detailed knowledge of sexual activity from LA's account of her own sexual assault. Person I Pet. App. 72A. This proffer was to "buttress" the petitioner's previously admitted evidence that the victim learned

about sexual activity when she watched the Playboy Channel at her grandparent's home. He also wanted to determine whether these two young girls were jointly fantasizing these events. Person I, Pet. App. 72.

The trial court ruled that, for the purposes offered, LA's testimony was irrelevant. Id. 73A. The court also relied on Connecticut General Statutes § 54-86d and 54-86e to hold that revelation of LA's victimization would violate those statutes. Id. note 5. However, the trial court did allow LA to be examined about any discussion she had with the victim regarding the victim's complaint. Person I, Pet. App. 126. The defendant did not call the victim to testify on this issue.

CONNECTICUT APPELLATE PROCEEDINGS

The Connecticut Appellate Court identified the petitioner's trial court claim as follows:

> that because the victim and her friend made similar complaints against their fathers, the jury should have been made aware of this fact for the purpose of weighing the credibility of the victim.

Person I supra at Pet. App. 73A. It went on to reject this evidentiary claim holding that the defendant provided no "logical link" between LA's complaint and the victim's assault which would prove that the victim's testimony was unreliable. Person I, Pet. App. 74A. The defendant failed to support his proffered reason for examining LA with any showing that it would undermine the accuracy of the victim's testimony. Id. The Appellate Court refused, however, to review any federal constitutional claims regarding this issue, ruling instead that they were procedurally barred because they were asserted for the first time in the petitioner's reply brief, and were inadequately briefed. Person I, Pet App.

73A-74A n. 5. The Connecticut Supreme Court refused to grant certification on this claim. see State v. Person, 213 Conn. 811, 568 A. 2d 796 (1990).

FEDERAL HABEAS CORPUS PROCEEDINGS

In his District Court writ, the petitioner asserted that the failure to admit LA's testimony violated both the compulsory process and due process clauses of the United State's Constitution. Pet. App. 13A to 14A. Reviewing the merits of this claim, the District Court agreed with the Connecticut Appellate Court and ruled that LA's testimony was "irrelevant and immaterial" and "arguably privileged under Connecticut Shield laws" . Person v. Meachum, Pet. App. 35A, 38A. Petitioner's constitutional claims were rejected. Id.

The Second Circuit "assumed" that the instant federal claim was not forfeited due the petitioner's failure to brief them in the Connecticut Appellate Court. Person v. Meachum, Pet. App. 5A. It also believed that

the evidence was admissible for the purpose offered, but its exclusion was not a constitutional violation. Id. 5A-6A.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS ARE PROCEDURALLY BARRED

This Court has ruled that federal court's are not empowered to review decisions of a state court that rests on "independent" state law grounds that are adequate for sustaining the decision. Harris v. Reed, 489 U.S. 255, 256, 261 (1989). Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground for barring review. Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978). All that is required from a state court decision enforcing its procedures is a "plain statement" that a claim is procedurally barred. Harris v. Reed, 489 U.S. at 261.

In this case, the Connecticut Appellate Court refused to grant review of the

petitioner's federal claims because they were raised for the first time in his reply brief, and were inadequately briefed. Person I, Pet. App.73A-74A n. 5. This unequivocal ruling is a plain statement of procedural bar within the holding of Harris v. Reed. Certiorari should not be granted for this claim because it was not preserved pursuant to state procedures. Ellis v. Dixon, 349 U.S. 458, 464 (1955).

The district court ruled, however, that the mere citation to one United States Supreme Court case[2] in the petitioner's appellate court reply brief, was sufficient to preserve his federal claims for collateral review. Pet. App. 33A.[3] The

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[2]. Washington v. Texas, 388 U.S. 14, 19 (1967). Pet. Appellate Court reply brief at p.11.

[3]. The district court held, "Even a cursory review of the petitioner's reply memorandum to the Appellate Court reveals he indicated the federal nature of his claim, thereby preserving his right to raise it in a petition for habeas corpus." Person v. Meachum, Pet. App. 33a-34A, n. 4.

district court, however, is not the proper authority for determining whether the petitioner complied with Connecticut appellate practice. State court's are the final arbiter of their own rules of practice.

Indeed, the district court's decision explicitly reversed the Connecticut Court's ruling that it will not review new claims raised for the first time in a reply brief. Person I Pet. App. 74A. n. 5. It is well established, however, that a Connecticut Appellant must raise all his legal issues, and thoroughly brief them in his original brief, in order to gain appellate review. Herbert v. Manson, 199 Conn. 143, 144. n. 2, 506 A. 2d 98 (1986); State v. Mack, 197 Conn. 629, 632, 500 A. 2d 1303 (1985); State v. Sitka, 11 Conn. App. 342, 343, 527 A. 2d 265 (1987). Even a constitutional issue is waived when it is not raised in an original brief, or is insufficiently briefed. State v. Redente, 19 Conn. App. 521, 531 n. 5. 563

A. 2d 1365, 1370 (1989). Moreover, Connecticut Court's will not review a claim when an appellant merely cites a case or constitutional amendment but does not provide any analysis as to its applicability. Commissioner v. Youth Challenge of Greater Hartford,Inc., 206 Conn. 316, 537 A. 2d 480 (1988)(mere listing of cases without analysis is not sufficient briefing); State v. Burroughs, 22 Conn. App. 507, 514-15, 578 A. 2d 146 (1990) ("Assignments of error, including constitutional errors, that are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court."). Where application of these rules is uniform and well established, federal courts must enforce the procedural bar which results. Francois v.Wainwright, 741 F. 2d 1275, 1281 (11th Cir. 1984).

It is noteworthy that, in seeking to invoke the Court's discretionary review,

the petitioner wholly misstates the issue presented to the state Appellate Court. According to the petitioner, the Appellate Court was asked to consider whether:

> (1) Defendant was denied his right to present a defense and his right to confrontation when the trial court refused to allow the defendant to present evidence that the child complainant's best friend had accused her own father of the conduct father of conduct very similar to the conduct allegedly committed by the defendant. Pet. at 5.

However, the issue, as framed above, does not appear anywhere in the statement of issues presented to the Connecticut Appellate Court.

Under Connecticut Practice Book rules, an appellant's final statement of issues is the issue page at the beginning of his brief. Practice Book § 4013(b). The

petitioner's statement of issues in the Appellate Court reads:

> Did the court erred in prohibiting the defendant from questioning the victim's best friend concerning her complaint that her father sexually assaulted Her?

Petitioner's Appellate Court Statement of Issues p. i. There is no reference to the compulsory process clause the confrontation clause or the due process clause in that declaration.

Similarly, the petitioner's restatement of the issue in his reply brief makes no mention of any federal constitutional claim whatsoever. Petitioner's Appellate Court Reply Brief. p. i.

In addition, Connecticut court's require, as does this Court, a table of authorities relied upon in a party's brief. Connecticut Practice Book § 4065 (b). The tables of authorities in both the petitioner's main brief and reply brief are bereft of any

mention of either the Sixth Amendment or the Due Process clause of the Fourteenth Amendment. Pet. Appellate Court Table of Authorities vii; Reply brief table of authorities p. ii. The only fleeting reference to a federal claim regarding this issues is in the reply brief and is contained in a one sentence quote from Washington v. Texas on the effect of excluding evidence proffered by a defendant. Petitioner's reply brief at 11. See Person v. Meachum Pet. App. 33A -34A note 4. Up until this point, and thereafter, the petitioner arqued this issue as a state evidentiary claim.

It was from this one sentence that the district court gleaned preservation. However, it was also from this one sentence that the Appellate Court ruled that the claim was abandoned for failure to comply with Connecticut's briefing requirements. This "plain statement" of procedural default divest federal court's of jurisdiction to

consider the petition unless the petitioner proves both cause and prejudice. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Petitioner alleges neither cause for failing to raise his federal claims below, or substantial prejudice which justifies relaxing the procedural bar rule. Therefore, certiorari should be denied. Ellis v. Dixon, 349 U.S. at 464.[4]

II. THE PETITIONER DOES NOT RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW

A) The Petitioner's Alleged Due Process Claim Is Unworthy Of Certiorari

Again in this Court, petitioner argues that the evidentiary ruling of the trial court violated his due process rights. The standard he applies is derived from this court's rulings regarding the government's failure to disclose exculpatory evidence.

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[4]. The petitioner did not raise the instant federal constitutional claim as part of his direct appeal to this court. Person v. Connecticut, U.S. , 111 S. Ct. 756 (1991).

Pet. at 13 citing United States v. Agurs, 427 U.S. 97 (1976) (whether the suppressed evidence creates a reasonable doubt that did not otherwise exist).

As respondent has argued, however, a petitioner on collateral review has a much higher burden than an appellant on direct appeal. United States v. Addonizio, 442 U.S. 178, 184 (1979) ("an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment"). Therefore, the proper standard for elevating an evidentiary ruling to a due process violation subject to collateral review, must be higher. Collateral review of this type of claim should serve as an additional safeguard "against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 429 U.S. 465, 491, (1976); see also Kuhlman v. Wilson, 477 U.S. 436, 454 (1986) (standard for repetitive petitions should be actual innocence). Thus

petitioner's actual innocence must be implicated by the excluded evidence.[5]

The petitioner alleges that a jury might have had a reasonable doubt if LA's testimony were allowed. This allegation alone is insufficient to elevate an evidentiary ruling to a constitutional violation under the general rubric of the due process clause. For this reason alone, the petitioner does not present a substantial federal question.

B. LA's Proffered Evidence Was Properly Excluded

This Court has held that a defendant's right to call a witness and present evidence is not unlimited, but must comply with established rules of evidence. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). LA's testimony was excludable because it would have exposed her to identification, in

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[5]. Neither the district court nor the Court of Appeals adopted the "actual innocence" standard for due process claims proposed by the respondent, yet both courts rejected the due process claim.

violation of Connecticut General Statutes § 54-86e. It should also be noted that LA was provided with added protection when she testified against her own father under Connecticut General Statutes § 54-86(g); because she would have been traumatized by public testimony. T 11/24/87 at 23-24. States have a legitimate interest in shielding child victims of sexual assault from exposure caused by their victimization. Michigan v. Lucas, ___ U.S. ___, 111 S. Ct. 1743 (1991); Maryland v. Craig, ___ U.S. _, 110 S. Ct. 3157, 3170 (1990). With these interests joined, the trial court had to determine the relevance and importance of LA's testimony to the defense.

Two theories were proffered for the admission of LA's testimony. First, it would show that the victim learned about explicit sexual conduct from a source other than the defendant. Person I, Pet. App. 72A. When offering this evidence, however, trial counsel admitted that it merely "bolstered"

Playboy channel. There is no compulsory process violation when a trial court excludes cumulative evidence. See Jackson v. Garrison, 677 F. 2d 371, 374 (4th Cir. 1981).

Moreover, petitioner's own offer indicated that LA was wholly unable to educate this victim on the "graphic details" about ejaculation and the nature of ejaculate which pervaded the victim's testimony. The very affidavit used to support the proffer indicated that "[LA] did not have any concept of ejaculation." Pet. App. 87A. LA's testimony, therefore, did not support the petitioner's theory. Second, the petitioner argued that LA's testimony was relevant to show that both victim's fabricated and fantasized these incidents. He never established any "logical link", however, between two complaints by friends and any theory that this established fabrication. Person I, Pet. App. 74A; Person

v. Meachum, Pet. App. 35A. Thus, the proffer did not support the theories presented to the trial court to a degree necessary to overcome the important protections afforded LA by Connecticut's statutory scheme.

That the Court of Appeals concluded differently in its materiality determination is merely its view that it might have exercised its discretion differently on the evidentiary issue presented, and does not mean that LA's testimony was constitutionally required. Person v. Meachum, Pet. App. 5A-6A (LA's testimony arguable basis for impeaching victim).

The trial court, however, was faced with the offer as presented at trial, and not with the honed version of the argument that has evolved since that time.[6] Moreover, the

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[6]. Petitioner cites several cases that discuss the relevance of childhood fantasies. Pet. at 16. These cases may have made the proffer arguably admissible to the Second Circuit but were critically lacking in the trial court.

of requiring testimony of a child/victim solely to provide the petitioner with what the Court of Appeals acknowledged as only "arguable" impeachment evidence. Nothing in either Washington v. Texas, or Chambers v. Mississippi, constitutionally compels admitting such evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Second Circuit Court of Appeals should be denied.

Respectfully Submitted,

STATE OF CONNECTICUT

By: _____

HARRY WELLER
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Appellate Unit
Office of the Chief
State's Attorney

June, 1992

(3)

No. 91-1888

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ERIC N. PERSON,

Petitioner,

v.

LARRY MEACHUM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. ARE THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS PROCEDURALLY BARRED?

II. DOES THE PETITIONER FAIL TO RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

The respondent State of Connecticut respectfully requests that this Court deny the petitioner for a writ of certiorari seeking review of the summary order in Person v. Meachum, 90-579, Petitioner's Appendix 3A-6A (hereinafter Pet. App.)

JURISDICTION

As is discussed in the argument portions of this brief, infra, the petitioner has failed to demonstrate why his federal claim is not procedurally barred. Thus it is unreviewable under 28 U.S.C. 2254. He also fails to demonstrate that he has raised a substantial federal question in either the state or federal courts. This Court, therefore, is without jurisdiction pursuant to 28 U.S.C. 1254 (1); Supreme Court Rule 10.1(a).

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(b) A table of authorities cited in the brief, with references to the page or pages of the brief where the citations to those authorities appear.

OPINIONS BELOW

The summary order of the Second Circuit Court of Appeals appears in the petitioner's appendix at pages 3A-6A. The district court's opinion denying the petition is reported as Person v. Meachum, 772 F. Supp. 69 (D. Conn. 1991). It is reprinted in memorandum form, in Petitioner's Appendix 8A-44A. The Connecticut Appellate Court's ruling on this issue is reported in State v. Person, 20 Conn App. 115, 564 A. 2d 626 (1989) (Person I), and is reprinted in the Petitioner's Appendix 61A-81A.

STATEMENT OF THE CASE

The Connecticut Appellate Court set forth the following history of the petitioner's case:

> The [petitioner] was arrested and charged with one count of sexual assault in the fourth degree; [Connecticut] General Statutes § 53a-73a(a)(1)(D); and one count of risk of injury to a child; [Connecticut] General Statutes § 53-21 in connection with certain sexual acts allegedly perpetrated against his older daughter. He was tried to a jury on these charges, along with the charges of risk of injury to a child and sexual assault in the second degree [Connecticut General Statutes § 53a-71(a)(1)] related to offenses involving his younger daughter, age eight at the time of the trial. He was

acquitted of the crimes involving the older daughter, but was convicted of the two crimes involving the younger daughter[1] (the victim).

The [petitioner] and the victim's mother were divorced in June, 1981. Subsequent to the divorce, the victim visited the [petitioner] on weekends at his apartment in Danbury [CT]. At trial, the victim stated that during these visits the [petitioner] would take her into his bedroom and engage in a number of sexual acts with her.

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[1]. Under Connecticut General Statutes § 54-83e it is improper to divulge the name and address of a sexual assault victim. The petitioner, however, has repeatedly published the names of both victims throughout his petition. Moreover, he has published the name of the witness (LA) whose testimony is at issue in this petition. LA was also the victim of an alleged sexual assault. The respondent requests this Court to seal the petition and honor Connecticut's confidentiality laws which are similar in form and purpose to 18 U.S.C. §3509 (4)(1)-(3). Both, lower courts honored similar requests after petitioner published the victims' names in his filings below. All court's deciding this case have managed to do so without identifying the victim.

> The victim described these acts very specifically, in graphic detail.

State v. Person, Pet. App. 63A-64A (footnotes omitted).

This "graphic detail" included the victim's ability "'to describe a physical ejaculation, the feel of seman [sic], its color, in a way nobody could except if it happened to them.' Tr. (January 26, 1988) at 25." Person v. Meachum, Pet App. at 37A-38A (District Court Opinion quoting the trial court judge).

At trial, the petitioner subpoenaed the victim's best friend LA to testify in his defense. LA had lodged a similar complaint against her father. Person I Pet. App. at 72A. Trial Counsel sought LA's testimony to determine whether the victim gained her detailed knowledge of sexual activity from LA's account of her own sexual assault. Person I Pet. App. 72A. This proffer was to "buttress" the petitioner's previously admitted evidence that the victim learned

about sexual activity when she watched the Playboy Channel at her grandparent's home. He also wanted to determine whether these two young girls were jointly fantasizing these events. Person I, Pet. App. 72.

The trial court ruled that, for the purposes offered, LA's testimony was irrelevant. Id. 73A. The court also relied on Connecticut General Statutes § 54-86d and 54-86e to hold that revelation of LA's victimization would violate those statutes. Id. note 5. However, the trial court did allow LA to be examined about any discussion she had with the victim regarding the victim's complaint. Person I, Pet. App. 126. The defendant did not call the victim to testify on this issue.

CONNECTICUT APPELLATE PROCEEDINGS

The Connecticut Appellate Court identified the petitioner's trial court claim as follows:

> that because the victim and her friend made similar complaints against their fathers, the jury should have been made aware of this fact for the purpose of weighing the credibility of the victim.

Person I supra at Pet. App. 73A. It went on to reject this evidentiary claim holding that the defendant provided no "logical link" between LA's complaint and the victim's assault which would prove that the victim's testimony was unreliable. Person I, Pet. App. 74A. The defendant failed to support his proffered reason for examining LA with any showing that it would undermine the accuracy of the victim's testimony. Id. The Appellate Court refused, however, to review any federal constitutional claims regarding this issue, ruling instead that they were procedurally barred because they were asserted for the first time in the petitioner's reply brief, and were inadequately briefed. Person I, Pet App.

73A-74A n. 5. The Connecticut Supreme Court refused to grant certification on this claim. see State v. Person, 213 Conn. 811, 568 A. 2d 796 (1990).

FEDERAL HABEAS CORPUS PROCEEDINGS

In his District Court writ, the petitioner asserted that the failure to admit LA's testimony violated both the compulsory process and due process clauses of the United State's Constitution. Pet. App. 13A to 14A. Reviewing the merits of this claim, the District Court agreed with the Connecticut Appellate Court and ruled that LA's testimony was "irrelevant and immaterial" and "arguably privileged under Connecticut Shield laws" . Person v. Meachum, Pet. App. 35A, 38A. Petitioner's constitutional claims were rejected. Id.

The Second Circuit "assumed" that the instant federal claim was not forfeited due the petitioner's failure to brief them in the Connecticut Appellate Court. Person v. Meachum, Pet. App. 5A. It also believed that

the evidence was admissible for the purpose offered, but its exclusion was not a constitutional violation. Id. 5A-6A.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS ARE PROCEDURALLY BARRED

This Court has ruled that federal court's are not empowered to review decisions of a state court that rests on "independent" state law grounds that are adequate for sustaining the decision. Harris v. Reed, 489 U.S. 255, 256, 261 (1989). Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground for barring review. Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978). All that is required from a state court decision enforcing its procedures is a "plain statement" that a claim is procedurally barred. Harris v. Reed, 489 U.S. at 261.

In this case, the Connecticut Appellate Court refused to grant review of the

petitioner's federal claims because they were raised for the first time in his reply brief, and were inadequately briefed. Person I, Pet. App.73A-74A n. 5. This unequivocal ruling is a plain statement of procedural bar within the holding of Harris v. Reed. Certiorari should not be granted for this claim because it was not preserved pursuant to state procedures. Ellis v. Dixon, 349 U.S. 458, 464 (1955).

The district court ruled, however, that the mere citation to one United States Supreme Court case[2] in the petitioner's appellate court reply brief, was sufficient to preserve his federal claims for collateral review. Pet. App. 33A.[3] The

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[2]. Washington v. Texas, 388 U.S. 14, 19 (1967). Pet. Appellate Court reply brief at p.11.

[3]. The district court held, "Even a cursory review of the petitioner's reply memorandum to the Appellate Court reveals he indicated the federal nature of his claim, thereby preserving his right to raise it in a petition for habeas corpus." Person v. Meachum, Pet. App. 33a-34A, n. 4.

district court, however, is not the proper authority for determining whether the petitioner complied with Connecticut appellate practice. State court's are the final arbiter of their own rules of practice.

Indeed, the district court's decision explicitly reversed the Connecticut Court's ruling that it will not review new claims raised for the first time in a reply brief. Person I Pet. App. 74A. n. 5. It is well established, however, that a Connecticut Appellant must raise all his legal issues, and thoroughly brief them in his original brief, in order to gain appellate review. Herbert v. Manson, 199 Conn. 143, 144. n. 2, 506 A. 2d 98 (1986); State v. Mack, 197 Conn. 629, 632, 500 A. 2d 1303 (1985); State v. Sitka, 11 Conn. App. 342, 343, 527 A. 2d 265 (1987). Even a constitutional issue is waived when it is not raised in an original brief, or is insufficiently briefed. State v. Redente, 19 Conn. App. 521, 531 n. 5. 563

A. 2d 1365, 1370 (1989). Moreover, Connecticut Court's will not review a claim when an appellant merely cites a case or constitutional amendment but does not provide any analysis as to its applicability. Commissioner v. Youth Challenge of Greater Hartford,Inc., 206 Conn. 316, 537 A. 2d 480 (1988)(mere listing of cases without analysis is not sufficient briefing); State v. Burroughs, 22 Conn. App. 507, 514-15, 578 A. 2d 146 (1990) ("Assignments of error, including constitutional errors, that are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court."). Where application of these rules is uniform and well established, federal courts must enforce the procedural bar which results. Francois v.Wainwright, 741 F. 2d 1275, 1281 (11th Cir. 1984).

It is noteworthy that, in seeking to invoke the Court's discretionary review,

the petitioner wholly misstates the issue presented to the state Appellate Court. According to the petitioner, the Appellate Court was asked to consider whether:

> (1) Defendant was denied his right to present a defense and his right to confrontation when the trial court refused to allow the defendant to present evidence that the child complainant's best friend had accused her own father of the conduct father of conduct very similar to the conduct allegedly committed by the defendant. Pet. at 5.

However, the issue, as framed above, does not appear anywhere in the statement of issues presented to the Connecticut Appellate Court.

Under Connecticut Practice Book rules, an appellant's final statement of issues is the issue page at the beginning of his brief. Practice Book § 4013(b). The

petitioner's statement of issues in the Appellate Court reads:

> Did the court erred in prohibiting the defendant from questioning the victim's best friend concerning her complaint that her father sexually assaulted Her?

Petitioner's Appellate Court Statement of Issues p. i. There is no reference to the compulsory process clause the confrontation clause or the due process clause in that declaration.

Similarly, the petitioner's restatement of the issue in his reply brief makes no mention of any federal constitutional claim whatsoever. Petitioner's Appellate Court Reply Brief. p. i.

In addition, Connecticut court's require, as does this Court, a table of authorities relied upon in a party's brief. Connecticut Practice Book § 4065 (b). The tables of authorities in both the petitioner's main brief and reply brief are bereft of any

mention of either the Sixth Amendment or the Due Process clause of the Fourteenth Amendment. Pet. Appellate Court Table of Authorities vii; Reply brief table of authorities p. ii. The only fleeting reference to a federal claim regarding this issues is in the reply brief and is contained in a one sentence quote from Washington v. Texas on the effect of excluding evidence proffered by a defendant. Petitioner's reply brief at 11. See Person v. Meachum Pet. App. 33A -34A note 4. Up until this point, and thereafter, the petitioner argued this issue as a state evidentiary claim.

It was from this one sentence that the district court gleaned preservation. However, it was also from this one sentence that the Appellate Court ruled that the claim was abandoned for failure to comply with Connecticut's briefing requirements. This "plain statement" of procedural default divest federal court's of jurisdiction to

consider the petition unless the petitioner proves both cause and prejudice. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Petitioner alleges neither cause for failing to raise his federal claims below, or substantial prejudice which justifies relaxing the procedural bar rule. Therefore, certiorari should be denied. Ellis v. Dixon, 349 U.S. at 464.[4]

II. THE PETITIONER DOES NOT RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW

A) The Petitioner's Alleged Due Process Claim Is Unworthy Of Certiorari

Again in this Court, petitioner argues that the evidentiary ruling of the trial court violated his due process rights. The standard he applies is derived from this court's rulings regarding the government's failure to disclose exculpatory evidence.

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[4]. The petitioner did not raise the instant federal constitutional claim as part of his direct appeal to this court. Person v. Connecticut, U.S. , 111 S. Ct. 756 (1991).

Pet. at 13 citing United States v. Agurs, 427 U.S. 97 (1976) (whether the suppressed evidence creates a reasonable doubt that did not otherwise exist).

As respondent has argued, however, a petitioner on collateral review has a much higher burden than an appellant on direct appeal. United States v. Addonizio, 442 U.S. 178, 184 (1979) ("an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment"). Therefore, the proper standard for elevating an evidentiary ruling to a due process violation subject to collateral review, must be higher. Collateral review of this type of claim should serve as an additional safeguard "against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 429 U.S. 465, 491, (1976); see also Kuhlman v. Wilson, 477 U.S. 436, 454 (1986) (standard for repetitive petitions should be actual innocence). Thus

petitioner's actual innocence must be implicated by the excluded evidence.[5]

The petitioner alleges that a jury might have had a reasonable doubt if LA's testimony were allowed. This allegation alone is insufficient to elevate an evidentiary ruling to a constitutional violation under the general rubric of the due process clause. For this reason alone, the petitioner does not present a substantial federal question.

B. LA's Proffered Evidence Was Properly Excluded

This Court has held that a defendant's right to call a witness and present evidence is not unlimited, but must comply with established rules of evidence. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). LA's testimony was excludable because it would have exposed her to identification, in

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[5]. Neither the district court nor the Court of Appeals adopted the "actual innocence" standard for due process claims proposed by the respondent, yet both courts rejected the due process claim.

violation of Connecticut General Statutes § 54-86e. It should also be noted that LA was provided with added protection when she testified against her own father under Connecticut General Statutes § 54-86(g); because she would have been traumatized by public testimony. T 11/24/87 at 23-24. States have a legitimate interest in shielding child victims of sexual assault from exposure caused by their victimization. Michigan v. Lucas, ___ U.S. ___, 111 S. Ct. 1743 (1991); Maryland v. Craig, ___ U.S. _, 110 S. Ct. 3157, 3170 (1990). With these interests joined, the trial court had to determine the relevance and importance of LA's testimony to the defense.

Two theories were proffered for the admission of LA's testimony. First, it would show that the victim learned about explicit sexual conduct from a source other than the defendant. Person I, Pet. App. 72A. When offering this evidence, however, trial counsel admitted that it merely "bolstered"

previously admitted evidence regarding the Playboy channel. There is no compulsory process violation when a trial court excludes cumulative evidence. See Jackson v. Garrison, 677 F. 2d 371, 374 (4th Cir. 1981).

Moreover, petitioner's own offer indicated that LA was wholly unable to educate this victim on the "graphic details" about ejaculation and the nature of ejaculate which pervaded the victim's testimony. The very affidavit used to support the proffer indicated that "[LA] did not have any concept of ejaculation." Pet. App. 87A. LA's testimony, therefore, did not support the petitioner's theory. Second, the petitioner argued that LA's testimony was relevant to show that both victim's fabricated and fantasized these incidents. He never established any "logical link", however, between two complaints by friends and any theory that this established fabrication. Person I, Pet. App. 74A; Person

v. Meachum, Pet. App. 35A. Thus, the proffer did not support the theories presented to the trial court to a degree necessary to overcome the important protections afforded LA by Connecticut's statutory scheme.

That the Court of Appeals concluded differently in its materiality determination is merely its view that it might have exercised its discretion differently on the evidentiary issue presented, and does not mean that LA's testimony was constitutionally required. Person v. Meachum, Pet. App. 5A-6A (LA's testimony arguable basis for impeaching victim).

The trial court, however, was faced with the offer as presented at trial, and not with the honed version of the argument that has evolved since that time.[6] Moreover, the

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[6]. Petitioner cites several cases that discuss the relevance of childhood fantasies. Pet. at 16. These cases may have made the proffer arguably admissible to the Second Circuit but were critically lacking in the trial court.

trial court was also faced with the prospect of requiring testimony of a child/victim solely to provide the petitioner with what the Court of Appeals acknowledged as only "arguable" impeachment evidence. Nothing in either Washington v. Texas, or Chambers v. Mississippi, constitutionally compels admitting such evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Second Circuit Court of Appeals should be denied.

Respectfully Submitted,

STATE OF CONNECTICUT

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